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Supreme Court of the United States

OCTOBER TERM, 1938

No. 276

GEORGE COUPER GIBBS, Individually and as Attorney General of the State of Florida, *et al.*,

Appellants,

vs.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*

APPELLEES' BRIEF.

THOMAS G. HAIGHT,
FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
MANLEY P. CALDWELL,
Counsel for Appellees.

APPELLATE LAW PRINTERS, INC., 108 Lafayette Street, N. Y.

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APPELLEES' BRIEF.*

Opinion Below.

The opinion of the District Court for the Southern District of Florida (R. 268) is unreported.

Questions Presented.

(1) Are the allegations of the bill of complaint, and the proofs offered to support them sufficient to sustain the jurisdiction of the court below?

(2) Did the court below abuse its discretion in granting the interlocutory injunction?

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*Italics in this brief ours unless otherwise indicated.

Statutes Involved.

The Florida Statute (hereinafter referred to as the State Statute), the validity of which is involved, is the Act of June 9, 1937, Florida Laws of 1937, Volume 1, General Laws of Florida, 1937, c. 17807, page 204. It is printed in full in the appendix to appellants' brief, and at R. 64-68. Its provisions are summarized below (pp. 9-20).

This case also involves the Act of March 4, 1909, as amended (35 Stat. 1075, Tit. 17 U. S. C., as amended) hereinafter referred to as the "Copyright Act", which is printed in Copyright Office Bulletin No. 14. Copies of this bulletin will be handed to the Court on the argument.

Statement of the Case.

A. Description of Appellees.

This suit was brought on the *joint* behalf of all members of the appellee, American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"), an unincorporated association organized under the laws of the State of New York, consisting of over 1,000 composers and authors and 123 publishers of music (R. 1, 2, 16), and *also* on behalf of each appellee in his *individual* capacity (R. 1-3, 5-14, 17-18, 23-34) to enjoin enforcement of the State Statute on the ground that it is in conflict with the Federal and State Constitutions and Treaties between the United States and foreign countries (R. 1-35).

The individual appellees, all of whom are members of the Society, are noted composers and authors and publishers of copyrighted music and the next of kin of deceased composers and authors (R. 2-3, 8-14, 76, 120-2, 129, 153-205).

B. Conditions necessitating organization of Appellee Society.

The Society was organized in 1914 under the leadership of the late Victor Herbert (father of appellee Ella Herbert Bartlett), Henry Blossom, Irving Berlin, Glen McDonough, appellee Buck and others as a means of protecting American composers, authors and publishers against the unauthorized use of their copyrighted musical compositions in *public performances for profit* by owners of dance halls, cabarets, night clubs, hotels, motion picture theatres and other places of public entertainment and amusement, and for the purpose of licensing such users to perform such compositions lawfully[1] (R. 15-16).

It was impossible to secure recognition of these rights individually and even collectively before the formation of the Society because of the organized refusal of economically powerful groups of users to respect the copyrights in this field. Users' associations employed counsel to defend suits for infringement brought against both members and non-members of the respective associations (R. 15). *Individually,* appellees and their predecessors were helpless because they did not have the means to employ investigators throughout the country to detect infringements by performances which were fugitive, fleeting and ephemeral, and of which no record was made by users; nor had they the means to employ lawyers throughout the country to prosecute infringement suits (R. 14-15).

The right of "public performance for profit" granted under Section 1(e) of the Copyright Act was thus nullified because of the copyright owners' practical inability to en-

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[1]This Court has already upheld the existence of these rights under the Federal Copyright Act as applied to a performance in a hotel by live musicians, and by means of a radio receiving set equipped with a loud speaker, respectively. *Herbert* v. *Shanley,* 242 U. S. 591 (1917); *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191 (1931).

force their rights. Before the Society was organized there was no means by which users of music who might be willing or inclined to pay for such performances could do so, because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; for instance, a dance hall uses on the average 81 compositions per evening (R. 85); it was impossible to get in touch with the individual owners of the particular compositions, many of whom were scattered throughout the world (R. 14-15); and obviously for every user to get an individual license from the 1123 members of the Society in the United States, to say nothing of copyright proprietors who reside and are citizens of other countries (there are 44,000 of these who are members of other societies with which the appellee Society has reciprocal agreements), would have presented an impracticable task. In fact many of them keep no records, and it would cost them more *for mere bookkeeping entries* under a system of individual licensing than they now pay for a blanket license to the Society (R. 116).

The Society has continuously functioned since 1914, solely for the purpose of doing for its members what they cannot do for themselves individually, namely, licensing the right of public performance for profit upon fair and reasonable license fees, and protecting them against infringement of their copyrights; *at no time has it dealt in any commodity; it has not dealt in sheet music, nor exercised any functions with respect to mechanical rights of reproduction* (R. 15-16).

It is not suggested that appellees charge exorbitant prices; indeed, the average price paid to the Society by users of music in Florida in 1936 for the right to publicly perform for profit the compositions of approximately 44,000 composers, demonstrates that the Society is most reasonable in the matter of charges. This schedule of average prices is as follows (R. 128):

"Radio broadcasters, $2,432.00 per year, per station.
Motion picture theatre exhibitors, $81.00 per year, per theatre.
Restaurants, $84.00 per year, per establishment.
Hotels, $80.00 per year, per hotel.
Dance halls, $85.00 per year, per dance hall.
Miscellaneous establishments, $103.00 per year, per establishment."

Congress has provided that the infringement of the performing rights of a single copyrighted composition shall entitle the proprietor to recover $250. per infringement (Copyright Act, Section 25; *Jewell-LaSalle Realty Company* v. *Buck*, 283 U. S. 202).

C. Efforts to destroy appellee Society as means of securing free use of right of public performance for profit.

Organized resistance to the Society's activities has always had as its sole object the destruction of the right of public performance for profit, so that users might have the same *free* access to the copyrighted musical compositions of members of the Society that they enjoyed before 1914. Among the schemes for accomplishing this end have been attacks on the Society as an alleged monopoly, interposed as defenses to suits for infringement,[2] setting up sham devices to avoid liability,[3] bringing a suit against the Society in the New York State Courts, claiming that the Society operated in restraint of trade,[4] filing complaints with the

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[2]See, *e. g., Harms* v. *Cohen*, 279 Fed. 276, 280 (E. D. Pa., 1922); *Buck* v. *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (D. C. R. I.).

[3]See R. 123-5.

[4]An application for injunction against the Society brought by the Motion Picture Exhibitors League of America to restrain the Society's activities on the ground that it was an alleged monopoly, was denied in *174th Street & St. Nicholas Ave. Amusement Co.* v. *Maxwell*, 169 N. Y. Supp. 895 (1918).

United States Department of Justice[5] and the Federal Trade Commission,[6] introducing numerous bills in Congress seeking to amend the Copyright Act so as to permit the users of music to perform publicly for profit the compositions of the Society's members without compensation,[7] bringing an anti-trust suit and securing the appointment of a temporary

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[5]Charges against the Society filed with the Department of Justice were dismissed on August 6, 1926 after investigating the Society's activities for two years, the Department pointing out the flagrant violation of copyrights by users of music in public performances for profit (R. 91-2).

[6]Charges against the Society before the Federal Trade Commission were dismissed on January 2, 1923 (R. 91).

[7]The following Bills were introduced in Congress, having as their object the amendment of the Copyright Law so as to destroy the right of public performance for profit as applied to copyrighted musical compositions, some of the bills seeking to enact legislation in many respects similar to the State Statute:

68th Congress, 1st Session: H. R. 713 (Dec. 5, 1923); H. R. 6250 (Jan. 26, 1924); S. 2600 (Feb. 22, 1924); S. 3078 (April 10, 1924); H. R. 8685 (Apr. 15, 1924); H. R. 8734 (Apr. 17, 1924);

69th Congress, 1st Session: S. 2328 (Jan. 7, 1926); S. 2811 (Jan. 16, 1926); H. R. 11209 (Apr. 12, 1926);

70th Congress, 1st Session: S. 4467 (May 3, 1928);

71st Congress, 1st Session: S. 1386 (June 4, 1929);

71st Congress, 3rd Session: S. 5687 (Jan. 5, 1931);

72nd Congress, 1st Session: H. R. 10364 (Mar. 10, 1932); H. R. 10740 (Mar. 22, 1932); H. R. 10976 (Mar. 30 1932); H. R. 11948 (May 7, 1932); S. 1035 (Dec. 9, 1931); S. 3985 (Mar. 2, 1932);

73rd Congress, 1st Session: S. 342 (Mar. 13, 1933);

74th Congress, 1st Session: S. 2465 (Mar. 13, 1935); S. 3047 (August 12, 1935);

75th Congress, 1st Session: H. R. 2695 (Jan. 12, 1937); S. 2031 (Mar. 29, 1937); H. R. 10633 (May 16, 1938).

receiver and an involuntary assignment of the Society's rights in the State of Washington[8] (R. 14-19, 76, 86-102, 116-28).

Appellees have been compelled to establish in many litigations that the rights given to copyright proprietors to publicly perform for profit musical compositions, covered various situations in which an attempt was made to publicly perform the musical compositions for profit without paying anything therefor to the copyright proprietors.

In *Herbert* v. *Shanley Co.* (229 Fed. 340), and *John Church Co.* v. *Hilliard Hotel Co.* (22[illegible] Fed. 229), the Circuit Court of Appeals for the Second Circuit held that the rendition of a copyrighted musical composition by a hotel orchestra and by professional singers accompanied by an orchestra, respectively, where no separate charge was made for the music, did not constitute a public performance for profit within the meaning of the Act. These decisions, however, were *reversed* by this Court (242 U. S. 591), Justice HOLMES saying:

> "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. * * * *It is enough to say that there is no need to construe the statute so narrowly.*"

The effort of moving picture theatre proprietors to escape the charge of infringement when *parts* of copyrighted musical compositions were played by orchestras, organs or other musical instruments during the showing of moving pictures,

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[8] An anti-trust suit under the State Laws brought against the Society by the Attorney General of Washington was dismissed and the receivership and assignments set aside on June 8, 1936. *State of Washington* v. *American Society of Composers, Authors and Publishers,* Superior Court, Thurston County, No. 16114 (unreported, printed at R. 130-132; See R. 93).

and where no separate charge was made for the music, was met by adverse decisions in the United States District Court for the Eastern District of Pennsylvania (*Harms* v. *Cohen*, 279 Fed. 276) and in the Circuit Court of Appeals for the Fifth Circuit (*Pastime Amusement Co.* v. *M. Witmark & Sons*, 2 F. (2d) 1020, aff'g 298 Fed. 470), as well as in a number of other courts whose decisions have not been reported.

In many cases it was held that there was a performance where the composition was rendered by a phonograph record or perforated music roll upon a player piano. *M. Witmark & Sons* v. *Calloway*, 22 F. (2d) 412 (D. C. E. D. Tenn.); *Buck* v. *Lester*, 24 F. (2d) 877 (D. C. E. D. S. C.); *Buck* v. *Heretis*, 24 F. (2d) 876 (D. C. E. D. S. C.); *Berlin* v. *Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz* v. *Buck*, 40 F. (2d) 501 (C. C. A. 5); cert den. 282 U. S. 880.

Finally, this Court in *Buck* v. *Jewell-LaSalle Realty Company*, 283 U. S. 191, established that the re-broadcasting by hotels or other public places of musical compositions which had been broadcast by radio, was within the protection of the Copyright Act. It had been previously held in a number of cases that broadcasting by radio of the rendition of a copyrighted musical composition constituted an infringement of the copyright.[8-a]

[8-a] *M. Witmark & Sons* v. *Bamberger*, 291 Fed. 776 (D. C. N. J.); *Remick* v. *General Electric Co.*, 4 F. 2d) 160 (D. C. S. D. N. Y.); *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6, reversing the District Court for the Southern District of Ohio); *certiorari denied*, 269 U. S. 556; *Remick* v. *General Electric Company*, 16 F. (2d) 829 (D. C. S. D. N. Y.); *Messager* v. *British Broadcasting Company, Ltd.*, 137 L. T. Rep., 810 (1927); 2 K. B. 543; (King's Bench Division of the English High Court of Justice); same case on appeal, Law Rep. (1928), 1 K. B. 660 (Court of Appeal); 140 L. T. Rep. 227 (1929) (House of Lords); *Chappell & Co., Ltd.* v. *Associated Radio Co. of Australia*, 50 Victorian Law Rep., 350 (1925), (Supreme Court of Victoria).

All these attempts to deprive appellees and others similarly situated of rights granted to them by Congress having failed, the users conceived the idea of nullifying these rights through state legislation (R. 18-19). As a result, statutes substantially along the lines of the State Statute were passed in Montana, Washington, Nebraska and Tennessee.[9]

The users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrighted music (R. 116-19). Although the statutes ~~purport to~~ be enacted in the public interest, the fact is that they were sponsored solely by those groups of users who have attempted to escape payment of copyright royalties through all the modern devices of lobbying at the command of organizations of radio broadcasters and operators of amusement enterprises (R. 126-8).

D. Summary of provisions of State Statute and practical effect thereof.

The provisions of the State Statute show clearly that they attempt to nullify the provisions of the Copyright Law which give to owners of copyrighted musical compositions the exclusive right of *public performance for profit* as interpreted by the decisions of this Court (*Herbert* v. *Shanley*, 242 U. S. 591; *Buck* v. *Jewell LaSalle Realty Co.*, 283 U. S. 191).

SECTION 1 makes it unlawful for authors, composers, publishers, owners, or their heirs, of copyrighted musical compositions to form any society, association, corporation or group (called a "combination" in the Statute) when the

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[9]These Statutes and the litigation challenging their validity are discussed *infra*, point X (p. 64).

members therein constitute a substantial number of the persons *"within the United States"* owning or controlling musical compositions and when one of the objects of the "combination" is the determination and fixation of license fees for any use of copyrighted music for private or public performance for profit. The collection of license fees so fixed from anyone using music in the conduct of his business, particularly theatres, radio stations, moving picture houses, hotels, restaurants, clubs and dance halls, is made unlawful; and collection thereof is prohibited in any court within the boundaries of Florida, and such collection or attempted collection is made a "separate offense". Such a "combination" is declared to be an unlawful monopoly *in the State of Florida,* and the fixing of prices or collection or attempted collection of license fees by it is declared illegal and in restraint of trade and is declared to be an intrastate transaction within the State of Florida.

This Section is obviously aimed at the Society since it consists of more than 1,000 American composers and authors and 123 American publishers, and it licenses the works of its members for a single fee which permits users to give non-dramatic performances of the separate musical compositions copyrighted or composed by members of the Society before or during the term of the respective licenses (Exs. "F", "G" and "H", R. 69, 70, 73, 74).

This Section, by providing that such a "combination" shall be in restraint of trade, makes it impossible for the Society to show that in fact it does not restrain trade.

Section 2-A requires all authors, composers and publishers to specify on the musical composition in whatever form it may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof "so arrived at and determined for all uses and purposes". When any purchaser or user acquires a copy of such composition in any form within the State of Florida and pays

the specified selling price to the seller or publisher thereof, the purchaser or user may use or render or cause or permit others to use or render the copyrighted musical composition by means of actors, orchestras, bands or through radio loud speakers or radio receiving, broadcasting or rebroadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise for private or public performances for profit without paying any further license fees. In the event of receipt of payment for such sheet of music, record or other device by anyone, the copyright owner "shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit".

This, of course, means that the selling price of sheet music and phonograph records is to be the only compensation which a copyright proprietor may receive for his work in the State of Florida, notwithstanding that the copyright act, as will be hereinafter shown, gives to such proprietors *several separate and distinct rights* for which, by virtue of his exclusive rights, he may charge one who wishes to avail himself of any of those rights respectively, whatever the copyright proprietor chooses, unless specifically limited by the copyright statute.

The only alternative would be for a copyright proprietor to charge for sheet music or phonograph records for private use, a price large enough to compensate him not only for the physical thing thus sold but for the performing rights as well. In this way the ordinary purchaser of sheet music or phonograph records would be penalized. This, of course, would result in penalizing purchasers of sheet music or phonograph records for private use, and, of course, would result in a diminution of sales.

This Clause nullifies Section 41 of the Copyright Act and the decisions interpreting that Section which hold that the purchase of a sheet of music does not give the purchaser the right to perform the same publicly for profit (see argu-

ment, *infra*, p. 43). It also nullifies Subdivision (e) of Section 1 of the Copyright Law which expressly provides that the payment of the statutory royalty of two cents to the copyright proprietor for the privilege of making a phonograph record, music roll or other part of an instrument serving to reproduce mechanically the musical work, shall not free such articles or devices from further contribution to the copyright "in case of public performance for profit" (Copyright Office Bulletin No. 14, p. 8).

The manner in which the Statute invades the exclusive rights granted to copyright owners under Article 1, Section 8 of the Constitution and Section 1 of the Copyright Act will be further discussed under Point II of this brief (p. 41).

Under Section 2-B, if the selling price is not fixed and collected upon the sale of a copy of the composition or an article or device for reproducing it, as provided in Section 2-A, the purchaser may use the same for public performance for profit without payment of any further license fee "free from any and all liability in any *infringement or injunction* suit, or in any action to collect damages * * * in any Court *within* this State".

This Section attempts to prevent the copyright owner from suing for infringement in the Federal Court to protect a right vouchsafed to him by the Federal Copyright Act. The prohibition applies whether the copyright owner is a member of a "combination" or an individual.

The prohibition of this Section is apparently made effective by Sections 8 and 10-A, the first of which subjects anyone to fine and imprisonment who attempts "to act within this State in violation of the terms of this Act", and the second, permits anyone who has been damaged by anything "forbidden in this Act" to sue in the State Court and recover his damages and attorney's fees.

Section 2-C reserves to a copyright owner the exclusive right to resell, copy, print, publish and vend the copyrighted

work after a sale in the manner aforesaid, but apparently all other rights under the copyright are given to the purchaser of a *copy* of the work, or an article or device for reproducing it. This Section further provides that authors and composers may fix the price to be charged for the use of the copyrighted musical composition independently of a "combination", but it does not give them the right to make such a charge apart from the price paid for purchase of a sheet of music or an article or device aforesaid.

SECTION 3 nullifies all *existing* contracts or licenses within the State made by any "combination" and declares that they were intra-state transactions and in restraint of trade. All parties bound by such contracts may enjoin enforcement thereof, and all agents, members or representatives of any "combination" attempting to enforce the terms of such existing contracts are guilty of violating the Statute and *subject* to its *penalties*.

SECTION 4-A gives a license to all operators of radio broadcasting, radio receiving or radio re-broadcasting stations in Florida to "receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination" without payment of any license fee.

In other words, all broadcasting stations in Florida are given the right to perform the copyrighted musical compositions owned by appellees without regard to the rights granted to appellees under the Copyright Act.

This Section would, of course, nullify what this Court held was one of the exclusive rights conferred upon a copyright proprietor by the Copyright Act in *Buck* v. *Jewell-LaSalle, supra* (283 U. S. 191).

SECTION 4-B permits Florida radio stations to receive, use, broadcast or re-broadcast within the State copyrighted

musical compositions which originate or emanate from an affiliated station without the State. The out-of-state broadcaster is prohibited from charging the Florida broadcaster any license fee for the purpose of paying or repaying the same to any "combination", and any out-of-state broadcaster attempting to collect such fees is declared to be an agent and representative of such "combination" and subject to the penalties of the Statute.

If this Section were valid, broadcasting stations in New York and other large cities from which musical programs emanate on national net works (R. 26-7) would be required to pay the license fees which are now paid by radio broadcasting stations in Florida, without any right on the part of such out-of-state broadcasting stations to be reimbursed for the payment of such license fees. The only alternative left to appellees would be to require their licensees out of the State of Florida so to control their programs that the compositions could not be "picked up" by broadcasting stations in the State of Florida. This would seriously interfere with interstate commerce and would prevent radio broadcasting stations, both within and without the State of Florida, from operating in the public interest. As a matter of fact, there is no way by which appellees can prevent performances of their works by means of radio broadcasting from crossing the borders of the State of Florida and being heard within that State.[10]

SECTION 5-A authorizes moving picture theatres and other places for amusement and public performance within the

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[10]This Statute would seriously hamper operations under the Federal Communications Act (48 Stat. 1064, Tit. 47 U. S. C. §§151-609) which is based on the fact that all broadcasts are of an interstate nature (*cf. Fischer's Blend Station, Inc.* v. *Tax Commission*, 297 U. S. 650 (1936); *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933).

State to perform by means of so-called "live talent", loud speakers, radio sound production or reproduction apparatus or electrical transcriptions or any other means whatsoever, copyrighted musical compositions, the copyrights of which are owned or controlled by any "combination", without payment.

This gives the same exemption to theatres and similar places of amusement that Section 4-A gives to broadcasting stations.

The effect of this Section is to outlaw any composer, author or publisher who is a member of a "combination" described in Section 1, and to allow anyone to pirate his exclusive public performance rights without any compensation whatever.

Section 5-B gives the same exemption from operation of the Copyright Law to such theatres and other places of amusement that Section 4-B gives to radio broadcasting stations, except that the owners of amusement enterprises mentioned in Section 5-B are permitted to perform without payment any compositions where such Florida music enterpreneur has a contract with someone from without the State who supplies the Florida enterprise with radio broadcasts, electrical transcriptions, sound production instrumentalities or live talent. In such case, the person supplying such talent from outside the State is prohibited from making any charge for purposes of repayment to any "combination".

This Section, compels orchestras and bands, as well as radio broadcasters and manufacturers of electrical transcriptions who supply music from a state in which appellees' activities are lawful, to pay license fees for performances within the State of Florida without being permitted to obtain reimbursement from the Florida enterprise to which they supply the music. This obviously interfers with interstate activities of the various industries supplying the means

for giving public performances for profit in the State of Florida, and in addition places such out-of-state persons at a disadvantage in competing with similar Florida enterprises which are permitted to supply such talent free of any royalties by reason of the exemption granted to them in Section 5-A, as well as Sections 1, 2-A and 2-B.

SECTION 6 grants the same exemption to Florida users that is granted to them by Sections 4-A and 5-A when the means of performances are supplied from without the State *even where the copyright owner is not a member of a "combination"*. That Section provides that where such performances are made possible by means of radio broadcasts, sound production instrumentalities or entertainers coming from *without* the State, all liability for copyright infringement shall rest upon the person outside the State who makes the performance possible or sends the performers into the State; "and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State". The Section recites that such performances within the State by means of instrumentalities or persons coming from without the State are "intra-state business".

This Section, like Sections 2-A and 2-B, shows clearly the purpose of this Statute. It is not aimed at monopolies or combinations in restraint of trade. Owners of Florida amusement enterprises are given the right to make free use of copyrighted works in public performances for profit regardless of whether the owners of such copyrighted compositions are members of a so-called "combination". The purpose of this Section is obvious. If perchance appellees

should find it possible to cease their collective licensing through the Society and should attempt to exercise their rights individually (which we have already seen would be impossible as a practical matter), the State Statute would bar them from asserting their rights because under Sections 2-A and 2-B a sale of any copy of the composition or of any article or device from which it could be reproduced would bar them from further licensing the right of public performance for profit; and if appellees, attempting to operate individually, should fix the price for a sheet of music at a figure high enough to compensate them for public performances for profit, Florida users would then need only to resort to the device of engaging their entertainers or receiving their broadcasts or records or electrical transcriptions from a point *without* the State, thus exempting them from any obligation to pay copyright royalties.

Under SECTION 7-A, if any such "combination" has any representative in the State of Florida, the "combination" is deemed to be doing business in that State, and service of process may be had upon such representative with "the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State".

Since appellees do not do business in the State of Florida, the Statute would enable the State Courts to secure jurisdiction over them so as to deprive them of their property and subject them to the penalties of the Statute, without being personally present within the State.

SECTION 7-B subjects all persons negotiating for or collecting or attempting to collect license fees or acting as representatives or agents for any "combination" to all the penalties provided for violations of the Statute.

SECTION 8 provides for a penalty of not less than $50.00 nor more than $5,000.00 and imprisonment of not less than one nor more than ten years, or both, for any "combination" or any representative or agent of such "combination", or of any firm or corporation attempting to aid or which aids any such "combination" in violation of the Statute.

The severe penalties of this Section and of subsequent Sections must be read together with Section 13, which provides that "the rights and remedies and provisions herein provided shall be and are hereby declared to be *cumulative* to all other rights, remedies and provisions now provided under the laws of the State of Florida".

SECTION 9 furnishes means of enforcement, in addition to the fines and imprisonment provided for in Section 8. Under Section 9 the State Courts are given jurisdiction to prevent and restrain violations of the Statute and requires the appellants, State's Attorneys in their respective circuits, under the direction of appellant Attorney General, upon any complaint of any party aggrieved to institute proceedings, civil or *criminal,* or both, under the terms of the Statute against any "combination" and its members, agents or representatives "to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof".

All these proceedings may of course be brought against appellees if they have any representative within the State, by service of process on such representative under Section 7-A.

SECTION 10-A authorizes any person to recover damages resulting from a violation of the Statute, together with costs and attorney's fees.

In other words, if appellees should attempt to issue licenses or collect under existing contracts in the State of Florida they will be liable not only to the penalties de-

scribed in Section 8 and proceedings described in Section 9, but also to a civil proceeding for a recovery of any amounts collected, in which proceeding they will be subjected to the usual costs, plus attorney's fees.

SECTION 10-B permits any party aggrieved to bring a civil suit if the State's Attorney and the Attorney General fail to act as provided in Section 9.

SECTION 11-A provides that in any proceeding under the Statute (whether an action by the Attorney General or an action by a person aggrieved for the recovery of damages), any attorney for the plaintiff may file in the State Court where the action is pending, a petition praying that defendants be required to file in Court "exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, *shall* determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants".

SECTION 11-B provides that a failure to furnish such evidence requires a court to adjudge a defendant guilty of contempt and to assess a fine of $100. for each day of his refusal to furnish such evidence. If they should refuse to furnish such evidence for a single month, the penalties under this Section alone would equal or exceed $3,000., and if they should refuse to do so for a year or more, the penalties would exceed $36,000.

SECTION 12 provides that the invalidation of one section shall not invalidate the remaining portions of the Act.

SECTION 13 provides that nothing in the Act shall be construed as repealing any other law in reference to matters contained in the Statute, and that the rights and remedies and provisions therein provided shall be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

The cumulative penalties referred to are those contained in Florida Compiled Laws (1927), Article 12, Section 7948, which imposes *additional* penalties of not less than $50., nor more than $5,000. and/or imprisonment from one to ten years upon persons combining to restrain trade. *Each day during the continuance of the violation is made a separate offense.* This section of the Compiled Laws is made directly applicable by a recital in Section 1 of the State Statute declaring that any combination condemned by such State Statute is "illegal and *in restraint of trade*".

E. Proceedings in the Court Below.

Appellees filed their bill of complaint in the court below wherein they sought an injunction, both temporary and permanent, against appellants, officials of the State of Florida, charged by the State Statute with the enforcement of the provisions thereof, from taking any proceedings to enforce the statute. The allegations of the bill were supported by voluminous affidavits (R. 76-205). Appellees presented at the same time a motion for a temporary injunction. Pursuant to the statute, a Three-Judge Court, consisting of Judge FOSTER, a Circuit Judge for the Fifth Circuit, Judge LONG, a District Judge for the Northern District of Florida, and Judge STRUM, a District Judge for the same District, was convened (R. 75) to hear plaintiff's application. Appellants filed a motion to dismiss the bill of complaint (R. 205-209), a motion to deny plaintiff's application for a preliminary injunction (R. 210-211) and affidavits in support of the *latter* motion (R. 211-268).

These various motions were heard by the Court and the motion to dismiss the bill was denied and the preliminary injunction granted (R. 268-271). Subsequent to the filing of the opinion and the entry of the order thereon, the Court made special findings of fact and conclusions of law (R. 276-284).

Summary of Argument.

For a summary of the argument, we refer the Court to the captions and sub-captions of the points hereinafter advanced. Any other summary within permissible bounds would be inadequate.

ARGUMENT.

Interlocutory injunctions have been granted restraining the enforcement of Statutes in Nebraska and Tennessee—the former substantially identical with the Florida Statute and the latter substantially identical with the Washington Statute which is before the Court in Case No. 329—In *Buck* v. *Swanson* (Unreported, D. C., Neb. Docket #Eq. 562, *per curiam* opinion by Hons. ARCHIBALD K. GARDNER, C. J., THOMAS C. MUNGER, D. J., and JAMES A. DONOHOE, D. J., Nov. 13, 1937); and in *Buck* v. *Keaton* (Unreported, Middle Dist. Tenn., Docket #Eq. 728, interlocutory decree entered by Hons. XENOPHON HICKS, C. J., JOHN J. GORE, D. J., and GEORGE C. TAYLOR, D. J., Dec. 1, 1938).

The opinion and decree in *Buck* v. *Swanson, supra,* are printed at R. 133, 134.

An appeal is now pending in this Court from the decision of the District Court for the Western District of Washington dismissing the bill of complaint in an action to restrain enforcement of a Washington statute seeking to accomplish the same object as the State Statute (October Term, 1938,

No. 329). In that case, the District Court dismissed the bill for lack of jurisdiction, after withholding a decision for nearly eleven months. A similar decision was rendered on December 28, 1938 by the United States District Court for the District of Montana on an application for interlocutory injunction to restrain enforcement of a statute of that State (Ch. 90, Laws of Montana, 1937) similar to the Washington statute (*Carl Fischer, Inc.* v. *Shannon*, D. C. Mont., Helena Div. #1537). It should be noted that the motion was argued April 23, 1937 but a decision was not rendered for twenty months and then only on the eve of the argument of the case at bar in this Court. The same Circuit Judge sat in both of these cases.

I.

The Court below had jurisdiction.

As appellants at the outset of their brief question the jurisdiction of the Court below, we have deemed it advisable to answer this contention before discussing the merits of the case.

A. The Controversy Involves More Than $3,000.

The Court below *specially* found that "the matter in controversy exceeds $3,000., exclusive of interest and costs" (R. 278). Under Rule 52 of the New Rules of Civil Procedure, this finding may not be set aside "unless clearly erroneous."

(1) The value of the matter in controversy is in excess of $3,000. as to appellees jointly.

In their motion to dismiss the bill, appellants urge (Paragraphs 2 to 6, R. 206-207) "that it affirmatively appears from the *allegations* of the bill or complaint, and the

exhibits attached thereto, that the jurisdictional amount of $3,000., exclusive of interest and costs, is not involved in this suit". Each of these two sections gives a different reason for the quoted averment. In their motion to deny the interlocutory injunction, they ask that each of the allegations of their motion to dismiss the bill be considered as grounds for the denial of the interlocutory injunction. The affidavits filed by *appellants* do not attempt to support the claim that the jurisdictional amount of $3,000. is not in controversy. Appellees' affidavits on the contrary support the allegations of the bill of complaint in this respect. The question, therefore, is whether the bill of complaint on its face as well as together with the supporting affidavits, show that the jurisdictional amount is involved, or if not, whether the case falls within that class of suits that may be brought in the Federal Court to protect a suitor's rights secured by the Federal Constitution, in which the amount in controversy is immaterial.

This action is brought on behalf of all members of appellant Society (an unincorporated association) to redress an injury to property rights, in which all of such members have a joint and common interest by reason of their assignments to the Society and their memberships therein (R. 1-2, 16-17; Exs. "B", "C", and "D", R. 37, 41, 44). Such joinder is permissible under Equity Rule 37, which was in effect when this action was brought.[11]

The action was brought on behalf of the members by Gene Buck, the President of the Society (R. 2, par. 2). The case involves, of course, a question of common or general interest to all of these members who constitute a class so numerous as to make it impracticable to bring them all

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[11] "RULE 37. * * * All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs * * *."

before the court. Consequently, a suit on their behalf by Mr. Buck was authorized under Equity Rule 38, which reads as follows:

> "RULE 38. REPRESENTATIVES OF CLASS.—When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

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Moreover under Section 12 of the General Associations Law of the State of New York, the domicile of all but one of the appellees, this action has been properly brought in the name of Gene Buck. This section is quoted in the footnote.[12]

Appellees *jointly* will lose a sum in excess of $59,000 each year for more than three years because the Statute invalidates 367 license agreements between the Society and users in Florida from which the Society received $59,306.81 in 1936—an average year (R. 24-6). Exhibits "F", "G" and "H" (R. 69, 73, 74) are typical license agreements between the Society and Florida users.

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[12] "§12. [N. Y. Laws, 1920, c. 915, §6, amended N. Y. Laws, 1932, c. 609, §2.] *Action or proceeding by unincorporated association.* An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members."

*[OMITTED THROUGH ERROR IN PRINTING.]

See also Rule 23 of Federal Rules of Civil Procedure; *Smith* v. *Swormstedt*, 16 How. 288, 302-3; *Beatty* v. *Kurtz*, 2 Pet. 566, 584-5; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Buck* v. *Elm Lodge*, 83 F. (2d)

If the Society[12-a] fails to comply with the Statute, it may be fined $5,000. for each violation of the Statute under Section 8; it may be dissolved under Section 9 and thus lose the benefit of its contracts throughout the country, including licenses to radio broadcasting stations throughout the country from which it receives annually $3,200,000 (R. 104). These existing contracts do not expire until December 31, 1940 (R. 69). If it attempts to collect license fees, it will be subjected to suits under Section 10-A to recover the same, plus costs and attorney's fees, thus subjecting it to 367 possible actions. If it fails to supply evidence which will incriminate it under the Statute, it will suffer a penalty of $100. for each day of refusal to do so under Sections 11-A and 11-B. In addition, under Section 13 which makes the penalties cumulative, the Society will be liable to similar fines of $5,000. and $100. per day, respectively under Article 12, Florida Compiled Laws 1927, Section 7948, which applies to combinations in restraint of trade. Section 1 of the State Statute defines the Society as such a combination, regardless of whether in fact it does or does not restrain trade. Thus by the State Statute, the Society is declared guilty of a violation of an earlier Statute intended to regulate and punish combinations in *actual* restraint of trade. The amount in controversy is determined by the *joint* interest of all members of the Society since the rights affected by the Statute are joint. Since appellees' interest in copyrighted compositions of which the exclusive performing rights have been assigned to the Society (and which the Society in turn has the right to license and has licensed to others on behalf of all its members) is common and undivided, it is enough that their interests *collectively* equal the jurisdictional amount. *Troy Bank*

[12-a] When the "Society" is referred to it will be understood that we mean the members of the unincorporated association in their joint capacity.

v. *Whitehead & Company*, 222 U. S. 39, 40[12-b]; *Local Union No. 497* v. *Joplin & P. Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Haynes* v. *Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.); See also *Shields* v. *Thomas*, 17 How. 3, 4. The value of these contracts is the amount involved. *Texas & Pac. Ry.* v. *Gentry*, 163 U. S. 353, 361.

Looking at the question of jurisdictional amount from the view-point of the value of a right which appellees seek to protect in this suit (*McNutt* v. *General Motors Corp.*, 298 U. S. 178, 181; *KVOS Inc.* v. *Associated Press*, 299 U. S. 269), it is manifest that such right vastly exceeds in value $3,000.

The State Statute prevents the appellees from *jointly* doing business in the State of Florida. The income from this business in that State alone averages $59,000 annually. Moreover, if appellees jointly do business in Florida, they incur penalties and criminal liability which conceivably may run to many hundreds of thousands of dollars.

It is idle under these circumstances to contend that the jurisdictional amount is not involved. Appellants attempt to escape the amount which is involved to the appellees jointly, by completely disregarding the fact that the Society is not a separate entity but a voluntary association of members who are acting jointly and in concert to protect their copyrights and realize the pecuniary benefits that the Copyright Act seeks to give them. Appellants' argument proceeds on the theory that the Society is exactly the same as

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[12-b] The rule is stated in that case as follows:

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

a corporation, which was the situation dealt with by this Court in *KVOS* v. *Associated Press, supra* (299 U. S. 269).

Appellants claim that under the *KVOS* case, *supra,* the joint claims of members of the Society must be disregarded. That case, however, bears no analogy to the case at bar. There, the Associated Press, a *corporation,* brought an action to restrain a radio broadcasting station from appropriating news gathered by the Associated Press or its members. The members of the Associated Press were owners of newspapers who divided among themselves the *cost* of the corporation's operations. The act complained of was the procuring of copies of papers published by three members and broadcasting certain items published therein before the news reached the public. The bill of complaint contained the usual allegation that the amount involved exceeded $3,000. This allegation however, was challenged, and as this Court held, the burden was then cast on the plaintiff to substantiate it. Plaintiff sought to discharge this burden by a reply affidavit to the effect that the payments made by newspapers for the news sold to them by plaintiff in the territory served by Station KVOS was upwards of $8,000. per month which was being imperilled by the defendant's acts, and that the plaintiff was in danger of losing "said membership and payments if defendants' practices in respect to pirating said news is not enjoined." This Court stated that the affidavit must be read in connection with the statement in the bill that plaintiff "made no profit from furnishing news to its members but equally divided the expense among them." This Court then went on to state (p. 278):

> "The association cannot therefore lose the $8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and as to any other damage they may suffer from petitioner's competition, the affiant is silent.

Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage *caused its members* by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because *the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal.*"

Previously the Court had said (p. 277):

"The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. *No facts are pleaded which tend to show the value of that right.*"

Obviously therefore, there is no such similarity between the case at Bar and the Associated Press case as would justify the dismissal of the bill of complaint in the former on the authority of the latter.

The appellee Society, on the *joint* behalf of *all* its members owns outright the performing rights in musical compositions (Exs. "B" and "C", R. 37, 41). It licenses these rights and collects moneys therefor. These moneys, as well as the rights belong to the members. Some of these moneys are never distributed but are set aside in a reserve fund (Articles of Association, Ex. "D", R. 44, 61); other moneys are set aside in a relief fund (Ex. "D", R. 61). In short, the Society on behalf of its members has a definite property right which has been and will be injured by the State Statute. The allegations of the bill and the supporting affidavits show that this right and the damage to it has a reasonable, definite and certain value greatly in excess of $3,000, to

say nothing of the penalties which the Statute imposes if the Society or the members jointly attempt to exercise the rights which the Copyright Laws give them.

The Society *must* give up all its existing contracts with licensees in the State of Florida because those contracts are expressly invalidated and enforcement or attempted enforcement thereof is made unlawful. Since the Society is outlawed, it necessarily loses all its rights and becomes subject to all the penalties provided in the Statute. If these penalties are assessed, they will be collectible from the joint moneys received by the Society from its operations in other states and will be paid by all the members jointly. If the Society is dissolved in an action in Florida, such dissolution will destroy the joint rights of all its members throughout the country.

Since the motion to dismiss (R. 205) is deemed to admit all the allegations of the complaint and since the affidavits in *opposition* to the motion for interlocutory injunction do not dispute the allegations relating to the jurisdictional amount, those allegations must be deemed admitted. *Polk Co.* v. *Glover,* 83 L. Ed. 73 (November 7, 1938).

McNutt v. *General Motors, supra* (298 U. S. 178), upon which appellees rely, presents an entirely different set of facts. There, an Indiana law fixed certain maximum finance charges on the business of automobile financing. The complaint failed to make any allegations as to the amount in dispute other than giving the *net worth* of plaintiff's business, the value of the contracts purchased by it during certain periods of time, the number of persons with whom plaintiff dealt, the annual rental paid by plaintiff in Indiana, the number of employees and the aggregate amount of their salaries. *Not a word appeared in the complaint as to the damage that would be sustained by plaintiff as a result of non-compliance with the statute.* The plaintiff in that case assumed that the amount in controversy was the value of its business, *but there was nothing in the statute that put*

the plaintiff out of business. For ought that appeared in the complaint in that case the statute could be complied with either at no cost at all to the plaintiff, or at a cost not in excess of $3,000. Under those circumstances, this Court in holding that there was no showing of the requisite jurisdictional amount, said at page 181:

> "* * * *But in the instant case, the statute does not attempt to prevent respondent from conducting its business.* There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. *The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. *They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve.* The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Referring now to the other cases relied upon by appellants, it will be found that none of them present a situation at all comparable to the case at Bar.

In *Wheless* v. *St. Louis*, 180 U. S. 379, ordinance directed the cost of certain improvements to be imposed upon several lots of ground adjoining the improvement. The

owners of the several lots joined in a single action challenging the validity of the ordinance. It was admitted that the various lots of land threatened with assessment were owned in *severalty;* that *no one complainant was interested in the lot of any other;* and that the assessment against no one lot would amount to $2,000 (pp. 381-2). Under the circumstances the court held that the necessary jurisdictional amount was not involved.

The *Wheless* case obviously is not in point because in the case at bar all the appellees do have an interest in the rights of the others which have been vested in the appellee Society, which in turn issues licenses on the *joint* behalf of all members and which license agreements are invalidated by this Statute.

Dewar v. *Brooks*, 16 F. Supp. 636 (D. C. Nev.), is likewise a case where the plaintiffs did *not* have a *joint* interest. There, each of the plaintiffs sought to be relieved of the payment of grazing fees, which in each case were less than the jurisdictional amount.

In *Buck* v. *Kloeppel*, 10 F. Supp. 345 (N. D. Fla.), Judge STRUM, who was one of the members of the Court below in the case at bar, held that four copyright owners who had assigned their performing rights to the Society could not join as plaintiffs in a suit for infringement against a single defendant infringing the works of all in a single evening's performance. A contrary conclusion was reached by the Circuit Court of Appeals for the Second Circuit in *Buck* v. *Elm Lodge, Inc.*, 83 F. (2d) 201 (C. C. A. 2). In the case at bar the action is not one for infringement of copyright but rather to redress an injury to the joint rights which the Society possesses on behalf of all its members.

In *Pope* v. *Blanton*, 10 F. Supp. 15, 18 (N. D. Fla.), the Florida State Constitution fixed the boundary along the Gulf coast at three leagues from the mainland. A Florida statute made it unlawful to use diving suits, helmets or other apparatus used by deep sea divers for the purpose of catch-

ing sponges from waters within the territorial limits of the State of Florida. Punishment for violation of the statute was a fine not exceeding $500. or imprisonment not exceeding one year, or both. Fifty-nine owners and captains of sponge boats sued to enjoin enforcement of the statute at a distance beyond three miles from the shore of Taylor county. The complaint was dismissed on the ground that there was no allegation that plaintiffs were engaged in a joint enterprise, and that there was nothing to show the damage caused to each individual by reason of the statute (10 F. Supp. 15). Thereafter, the complaint was amended by alleging that the boats of each of the plaintiffs were worth in excess of $3,000.; that the sales of all plaintiffs through the sponge exchange amounted to $300,000. yearly; that the profits were distributed among them; that in excess of 50 per cent of the sponges were gathered from five to ten and one-half miles off the shore of Taylor county; that off the shore of that county sponges grew more rapidly and were more easily gathered than elsewhere, and that plaintiffs would be irreparably damaged unless defendants were restrained from enforcing the statute. Thereafter another motion to strike the bill was made.

The court pointed out that the bill failed to show the loss suffered by plaintiffs by reason of their inability to catch sponges within the distance of nine miles from shore (the original bill alleged that sponges were gathered at a distance of from seven to fifty miles from the mainland), and there was nothing to show how much more it would cost plaintiffs to gather sponges elsewhere.

The District Court refused an interlocutory injunction.

This Court modified the decree by dismissing the bill of complaint for lack of jurisdiction, on the authority of the *McNutt* case, *supra* and the *KVOS* case, *supra* (*Pope* v. *Blanton*, 299 U. S. 521). This Court did not attempt to point out how that case was governed by the cases cited.

We think it clear, however, that it must have ordered a dismissal of the bill because there was nothing in the bill or affidavits to show how much more it would cost plaintiffs to gather sponges elsewhere than within the territorial limits of Taylor County. It will be remembered that in the *McNutt* case this Court said (p. 181) that the value of the right sought to be protected "may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." We have already shown that the loss to appellees "which would follow the enforcement" of the State Statute is greatly in excess of $3,000. and that their interests are joint.

The decision in *Buck* v. *Case*, 24 F. Supp. 541 (W. D. Wash.), is the subject of a separate appeal in this Court, which will be argued immediately following the argument of the case at bar (October Term, 1938, No. 329).

(2) THE VALUE OF THE MATTER IN CONTROVERSY AS TO EACH INDIVIDUAL APPELLEE EXCEEDS THE VALUE OF $3,000.

Irrespective of the damage which the State Statute will cause all the members of the Society jointly, it will be recalled that ten individuals are parties plaintiff (R. 1), and the bill and affidavits show that the enforcement of the State Statute will cause each of these individuals damage in excess of $3,000., the amount of damage being given in each individual case, as will be presently shown.

(a) Any attempt on the part of the individual appellees to protect their rights in Florida against infringement will cost them each greatly in excess of $10,000. for the employment of investigators, clerical help, accountants and lawyers (R. 18). The cost to each individual appellee establishing an agency to protect each of them would greatly exceed any revenue that they might respectively hope to

collect in the State of Florida (R. 24). The individual appellees have neither the resources, funds, organization nor ability to protect their copyrighted musical works against infringement, and if they are deprived of the right to combine they will have to surrender and forfeit the right of public performances for profit which is given to them under their respective copyrights (R. 17-18).

As previously shown, the members of the Society jointly receive an average income in Florida of $59,000. If they are required to act separately, this income would therefore be entirely wiped out and a deficit would take its place. Appellees are, of course, entitled to the benefits which flow from their copyrights and they are entitled to protect those rights. As the cost of protection would exceed as to each $10,000. and as the attempt to realize upon the copyrights when acting individually, would turn a present profit into a deficit, the loss which the enforcement of the Statute would cost each individual appellee, would be greatly in excess of $3,000.

(b) If appellees fail to comply with the Statute they may suffer penalties amounting to $10,000. for every violation of the Statute[13] in addition to being subject to the other penalties of the Statute, including a fine of $100. a day for each day they fail to furnish incriminating testimony.

(c) Appellees will lose the amounts which they now receive from the Society since the Statute compels them

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[13]The State Statute makes appellees subject to a $5,000 fine under Section 8, and to an additional $5,000 fine under the State Monopoly Statute (Laws of Florida, 1915, Vol. I, 281; amended, Laws of Florida, 1925, Vol. I, 517), the penalties of which statute are made applicable under the provision for cumulative penalties in Section 13 of the State Statute.

to surrender their membership. The contracts of each do not expire until December 31, 1940 (R. 17-18). On the basis of past annual receipts in excess of $50,000. each (R. 32), appellees Carl Fischer, Inc., G. Schirmer, Inc. and Irving Berlin, Inc. will each suffer a net loss in excess of $150,000. Appellees Buck, Nevin, Taylor, Speaks, Hill, Sousa and Bartlett will each lose in excess of $15,000., each having received in excess of $5,000. from the Society annually in the past (R. 32-3).

There is no way of compensating for this loss, because as a practical matter the Statute makes it impossible for appellees either jointly or severally to secure any royalties from users in Florida who publicly perform for profit appellees' copyrighted musical compositions.

It seems clear that the facts showing the necessary jurisdictional amount are amply alleged as to each appellee individually, as well as jointly, in his capacity as a member of the Society. In any event it is sufficient if the necessary jurisdictional amount be shown as to any one appellee. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 241-2.

B. The State Statute denies to appellees equal protection of the laws and deprives them of privileges and rights secured by the Constitution of the United States; hence the Court below had jurisdiction of the cause regardless of the amount involved.

Where a claim is made that a citizen is being deprived by the *laws of a state* of any rights or privilege secured by the Constitution of the United States, the Federal Courts have jurisdiction regardless of the value of the matter in controversy (Jud. Code, §24, subds. 1, 14, U. S. C. Tit. 28, §41, R. S. §§563, 629, amended, 36 Stat. 1091; 48 Stat. 775;

Act of Aug. 21, 1937, c. 726, §1, 50 Stat. 738, printed in margin).[14]

It is not entirely clear what the exact line of demarcation between subsection 1 and subsection 14 is. We think however, that it is that found by Judge LEARNED HAND, after a review of the authorities, in *Marcus Brown Holding Co. v. Pollak*, 272 Fed. 137, 140-141 (S. D. N. Y.). His

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[14] "SECTION 41. (*Judicial Code, section 24, amended.*) *Original jurisdiction.* The district courts shall have original jurisdiction as follows:

"(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. *The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.* * * *"

(Paragraph 14 which follows is a "succeeding paragraph"):

"(14) *Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

view as we understand it is that the word "secured" is used in subsection 14 in the sense of "created" as distinguished from a right existing before the Constitution. If this view is correct, the provisions of subsection 14 are applicable to the case at Bar for the following reasons:

(a) The suit is based upon the abridgement or deprivation by the State Statute of rights given to appellees through their copyrights.

Copyrights are *new* rights *secured* and *created* by the Constitution and the Laws of the United States. *Wheaton* v. *Peters*, 8 Pet. 591, 661-5 (1834); *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127 (1932).

The State Statute deprives appellees of the right to have and enjoy the exclusive rights under certain copyrights granted to them respectively under Article 1, Section 8 of the Constitution of the United States and the Copyright Act, and the right to exercise these rights freely in the State of Florida without abridgement or interference; it denies to them in the exercise of these rights the equal protection of the laws and grants special privileges to users of copyrighted music in the State of Florida at the expense and in disregard of appellees' rights as hereinafter set forth (R. 5-8, 17).

The State Statute on its face deprives appellees of the right to act collectively. Yet, the individual appellees have neither the resources, funds, organization nor ability to protect their respective copyrighted musical works against infringement by unauthorized public performances for profit within the State of Florida (R. 18). Thus as a practical matter the State Statute deprives them of the right to enjoy their property in their copyrights.

The complaint alleges (and it is not denied) that the State Statute makes further inroads on appellees' copyrights by preventing them from licensing the broadcasting of their compositions outside the State of Florida if such broadcast

may be heard within or transmitted by wire or otherwise to the State of Florida; by depriving appellees of the means of detecting infringements in the State of Florida; by depriving them of unrestricted access to the Federal Court for redress for infringement of their copyrights; by setting up a system of wholesale price-fixing of copyrights in destruction of *existing* copyrights and of rights to obtain the full benefits of the Copyright Act in securing *future* copyrights; by interfering with the publication of appellees' copyrighted compositions in compelling them to keep a record of all purchasers of copies or records thereof within the State of Florida, and imposing upon them the impossible task of determining whether public performances for profit were given or authorized by purchasers of the sheets of music or of phonograph or of other records thereof in the State of Florida, and whether such performances were made or authorized by persons who had purchased sheets of music or records without that State, or who had obtained so-called "professional" or complimentary copies thereof (R. 27-8).

It is further alleged and not denied that the State Statute was enacted as a pretext under which the State of Florida is attempting to usurp the power to enact copyright laws delegated by the Constitution solely to Congress, and that the State Statute under the guise of an exercise of the police power interferes with the copyrights of appellees; that in truth and in fact the State Statute was enacted not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of appellees and others similarly situated without being compensated therefor, and without danger of being compelled to pay damages for infringement as provided in the Copyright Act (R. 29).

The State Statute deprives appellees of the right to enter into voluntary contracts licensing the public performance

for profit of their copyrighted musical works and of the right to determine the conditions under which such works may be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof (R. 29).

(b) The prohibition of the Fourteenth Amendment against the denial of the equal protection of the laws has been held to come within subsection 14.

Truax v. *Raich, supra*, 239 U. S. 33, 39, aff'g 219 Fed. 273, 283, (D. C. Ariz.), invalidated a statute of Arizona which required employers of more than five workers to employ not less than 80 per cent qualified electors or native born citizens, violation of the statute being punishable by a fine of not less than $100. and imprisonment for not less than thirty days. Plaintiff in that case was a native of Austria who was threatened with discharge because he was employed in a restaurant employing more than five persons. The complaint alleged that the statute violated plaintiff's rights under the Federal Constitution by denying equal protection of the laws. Plaintiff was not subject to the penalties of the statute, which were visited only upon employers. The lower court held that an allegation of a particular jurisdictional amount was not necessary because plaintiff was being deprived by the statute of a right secured under the Federal Constitution (p. 283). This Court affirmed without discussing the jurisdictional question, but by its affirmance of the injunction we think it must have approved the lower court's conclusion in this respect.

The State Statute denies equal protection of the laws because it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performances of musical works which are not copyrighted under the Laws of the United States but which are protected at common law; a great many forms of copyright and kinds of copyrighted works are presently and consistently dealt

in, licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which is affected by the State Statute (R. 28).

The penalties imposed on appellees by the State Statute result in denying them equal protection of the laws and in depriving them of the opportunity to exercise the privileges, rights and immunities of citizens of the United States in the State of Florida unless they give up certain rights granted to them by the Federal Constitution, to wit, certain exclusive rights granted to them by their copyrights, and unless they give up the right of free access to the Federal Courts to redress infringement of their respective copyrights. In other words, the enjoyment of one Federal right in the State of Florida is conditioned by the State Statute upon the surrender of another Federal right. Such a Statute is clearly invalid. *Paul* v. *Virginia,* 8 Wall. 168, 180; *Terral* v. *Burke Construction Co.,* 257 U. S. 529, 532; *Harrison* v. *St. Louis & San Francisco R. R.,* 232 U. S. 318, 328.

In singling out for the condemnation of the Statute one class of owners ~~for~~ of intellectual property (namely owners of copyrighted musical compositions) and exempting all others engaged in exactly the same business, the Statute denies equal protection of the laws. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540-562.

The sole object of the State Statute is to oppress and discriminate against these appellees in favor of their 367 licensees in the State of Florida. That this is in fact the purpose of the Statute is a proper subject of judicial inquiry for the purpose of showing a denial of equal protection. *Dobbins* v. *Los Angeles,* 195 U. S. 223, 240; *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86. The *McFarland* case, *supra,* is discussed below at page 46.

II.

The Statute on its face is a clear violation of Article I, Section 8, clause 8 of the Constitution of the United States.

Article I, Section 8, Clause 8 of the Constitution provides that:

> "The Congress shall have power: * * * To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the *exclusive right* to their respective writings and discoveries."

Congress has defined such exclusive rights by granting to the owner of a copyright in a musical composition the exclusive right:

> "(a) To print, reprint, publish, copy and vend the copyrighted work * * *.
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., §1).

The only limitation which the Copyright Act places upon the exclusive right to make a record is that under certain circumstances a manufacturer may make records of a copyrighted work without the consent of the author upon paying two cents for each record made, but the payment of this two cent royalty does not give the manufacturer the right of public performance for profit. The Copyright Act, Section 1(e), 2nd proviso, reads in part as follows:

"* * * whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: *And provided further,* That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

"In case of the failure, of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount."

A purchaser of a phonograph record or electrical transcription may perform it privately, but may not perform it *publicly for profit* without the consent of the copyright owner. *Irving Berlin, Inc.* v. *Daigle,* 31 F. (2d) 832 (C. C. A. 5); *Lutz* v. *Buck,* 40 F. (2d) 501, cert. den. 282 U. S. 880.

The exclusive right of public performance for profit is retained by the copyright owner under section 41 of the Copyright Act notwithstanding a sale of copies of the copyrighted work.[15]

Appellees, upon securing their respective copyrights were granted *exclusive* rights which even the United States may not invade. *United States* v. *Dubilier Condenser Corp.,* 289 U. S. 178, 186, 189; *James* v. *Campbell,* 104 U. S. 356, 358; *United States* v. *Bell Telephone Co.,* 167 U. S. 224, 249-50.

A fortiori, the State of Florida may not invade these exclusive rights in the manner attempted by the State Statute.

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[15]Section 41 reads as follows (Copyright Office Bulletin No. 14, p. 22):

> "SEC. 41. The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Purchase of the material object (*e. g.* engraved plates, books, sheets of music etc.) was held not to give any rights in the copyright in *Stephens* v. *Cady,* 14 How. 528 (1852); *Stevens* v. *Gladding,* 17 How. 447 (1854); *Henry Bill Pub. Co.* v. *Smythe,* 27 Fed. 914, 921 (S. D. Ohio); *Harms* v. *Cohen,* 279 Fed. 276, 280 (E. D. Pa.).

Moreover, Congress has completely covered by legislation the field of copyright and asserted its authority thereover. Consequently, the several states have lost any right that they may have had to legislate in that field. This proposition is so well settled as to need no citation of authority. However, some of the cases of this Court are collected in a footnote.[16] Thus the attempt by the State of Florida, through the State Statute, to invade the copyright field and regulate, directly or indirectly, the rights of copyright owners, is nugatory and the Statute invalid. The State Statute purports to define and regulate radio broadcasting in the "public interest". But this Court has already held that that field has been covered by Congress. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 283.

A copyright owner can rely only on the laws of the United States for his remedies. *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356, 367 (1908). All rights granted by Congress are exclusive. *Lithographic Co.* v. *Sarony*, 111 U. S. 53, 56, 59 (1884); *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 291 (1907); *Caliga* v. *Inter Ocean Newspaper Co.,* 215 U. S. 182, 188 (1909).

Among the exclusive rights granted to copyright owners is the right of public performances for profit which includes performances by live musicians in hotels, restaurants and night clubs (*Herbert* v. *Shanley,* 242 U. S. 591), performances by means of radio broadcasting or re-broadcasting (*Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191), and by means of a radio receiving set installed in each room of a hotel operated from a master-controlled set (*Society of European S. A. and C., Inc.* v. *New York Statler Hotel, Inc.*, 19 F. Supp. 1 [1937, S. D. N. Y.]).

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[16] *United States* v. *Hill*, 248 U. S. 420; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57.

The State Statute deprives copyright owners of the right to license the re-broadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Federal Copyright Law and Federal Constitution.

It also deprives them of the right to licen. the public performances for profit of their copyrighted musical compositions apart from the sale of sheet music, or of records, or electrical transcriptions. It deprives them of the right to license their copyrighted works to different licensees in different States, because the State Statute provides that a license given to users outside the State confers a license upon users in the State of Florida with the separate consent of the copyright owner, and in fact, regardless of his consent.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by su h owners (*F. A. D. Andrea, Inc.* v. *Radio Corp. of America,* 88 F. (2d) 474 (C. C. A. 3), aff'g 14 F. Supp. 226, cert. den. 300 U. S. 681; *Buck* v. *Hillsgrove Country Club, Inc.,* 17 F. Supp., 643 [D. C. R. I.]). The several States may not pass laws to the contrary (*Henry Bill Pub. Co.* v. *Smythe,* 27 Fed. 914, 917 [S. D. Ohio]).

Yet the State Statute attempts to fix the terms and conditions upon which appellees may grant licenses under their copyrights.

III.

The Statute is invalid under the doctrine of McFarland v. American Sugar Refining Co., 241 U. S. 79, as an attempt to destroy appellees' property rights by legislative fiat.

The attempt to destroy the Society by a *Statute* which declares that it shall be deemed to be in restraint of trade without giving the Society a right to show that it is not in restraint of trade is similar to the attempt of the State of Louisiana in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79 to legislate the American Sugar Company out of existence in that state. A statute there declared the business of refining sugar to be impressed with the public interest "by reason of the nature and by reason of the monopolization thereof", and on that footing certain regulations were made. It authorized an inspector to make reasonable regulations affecting any branch of sugar refining in the public interest and to prevent monopoly, and then provided that any person engaged in the business of refining sugar within Louisiana who systematically paid in Louisiana a less price for sugar than he paid in any other state "shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade." Drastic penalties followed, as in the case of the State Statute, leading ultimately to the appointment of a receiver. Failure to operate a plant for a period of one year or to sell it within six months thereafter also gave rise to the appointment of a receiver with a power to sell the plant within twelve months after appointment. The statute provided that an injunction could be issued or a receiver appointed after a hearing, subject to an appeal.

In that case the court pointed out that the following allegations of the bill "throw special light upon the case"

(p. 82): The plaintiff, American Sugar Company, built a new refinery in Louisiana and closed an old one in the State to save expense; it purchased less than one-half of Louisiana sugar crop, often paying lower prices in Louisiana than it would pay in New York. The answer alleged that plaintiff was a monopoly and combination in restraint of trade completely controlling the sugar trade in Louisiana; that suits had been brought against it by the United States and others under the Sherman Act. Other facts were alleged in the answer attempting to show that the plaintiff was in fact a monopoly. In affirming a decree granting an interlocutory injunction, this Court (per Mr. Justice HOLMES) said at p. 85:

"The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity, since it made the legislation necessary. If the connection were admitted it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights or prevent it from asserting them in the only practicable and adequate way.

"The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We

deem it sufficient to refer to those that were mentioned by the District Court; a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that *can have no foundation except the intent to destroy.*"

In commenting on the presumption making the Sugar Company guilty of being an unlawful monopoly, the Court said at page 86:

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed*, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But *it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.* If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

Applying that decision to the case at bar, the Society is made guilty of being a combination in restraint of trade because it constitutes a number of composers, authors and publishers who have assigned their performing rights to the Society, which in turn fixes the price of a license for the public performance for profit of the copyrighted musical compositions of the members of the Society. That activity is declared to be an unlawful combination in restraint of trade, regardless of whether or not it is in fact and in law such a combination.

The record shows, and there is no denial of the fact, that no payment whatsoever was made for the right to perform publicly for profit copyrighted musical compositions until the organization of the Society, and that there are no means for licensing these rights except through the Society; that it would be so costly and unwieldy to attempt to license these rights on a basis of individual bargaining as to each performance, that it would be impossible to license them as it was impossible before the Society was formed.

The draughtsmen of the Statute realized this impossibility and provided for it by a rather cunning device. The mere purchase of a sheet of music or the mere importation from another State of a record or of performers or of a radio broadcast was seized upon as a means of exempting Florida users from the duty to respect the exclusive rights of copyright owners, as applied to the right of public performance for profit. Such a thinly veiled invasion of property rights can hardly be countenanced. This is especially true where a State Statute under the guise of the public interest seeks to nullify, destroy and confiscate rights granted under the Federal Constitution and to invade a field particularly reserved to Congress.

IV.

The Society is not an unlawful combination in restraint of trade; but even if it were, the State of Florida may not deprive the members of the rights secured to them by their copyrights, and a Court of Equity may not deny them the means of protecting those rights.

Appellants urge that appellees should be denied any relief because they allegedly come into Equity with unclean hands in that the Society is "a price-fixing combination operating in restraint of trade."

We have shown above the purpose for which the Society was formed. It was not to restrain trade in any sense of the word both because the rights of the Society are only to grant licenses for public performances and because the licenses are given equally to all persons applying for them upon reasonable terms.[17] A copyright gives to the proprietor thereof an exclusive right. All that the members of the Society have done is to vest in representatives of their choosing, the right to grant collective licenses under all of the copyrights of all of the members of the Society. The record is void of any suggestion of oppression or illegal use in combination of what the individual members of the Society

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[17] Appellants contend that the Society discriminates between newspaper-owned broadcasting stations and others, comparing the contract (R. 243) under which a station owned by a newspaper guarantees a minimum payment of $2,000 (R. 246) with the payment of 3% of the gross amount received from the sale of broadcasting facilities in which music copyrighted or composed by members of the Society is rendered until the receipts reach a total of $25,000 and 5% thereafter (R. 246)—with the contract by stations which are not newspaper-owned and which guarantee a minimum payment of only $1,000 with percentage payments on receipts from the sale of all broadcasting facilities ranging from 3% to 5% of such receipts and permitting the broadcasting station to make a 15% reduction for advertising agency commissions (R. 71). These two types of contracts are the standard forms of contracts. They are entirely different. It cannot be said that either one discriminates against the other.

could have done separately. The purpose of the Society is to protect the copyrights and at the same time make it possible for those who wish to use for public performance for profit the musical compositions of the members, to do so by getting a blanket license on reasonable terms.

Users have consistently and uniformly objected to the separate licensing of individual compositions on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of all types of musical compositions that are pleasing and entertaining to the public (R., 18).

It is impossible for users to secure in advance the consent of all copyright owners whose works are performed in their places of public entertainment (R. 80). If not for the Society, all composers and authors would be compelled to forego all benefits from the public performance for profit of their copyrighted compositions by users of music.

It would be impossible to license single compositions, because the users do not keep any records of the compositions played by them (R. 114). The smaller broadcasting stations are opposed to such a system of individual licensing, because of the tremendous expense and hardship which would be imposed on them (R., 114). Broadcasting stations in Florida do not keep a record of all the musical compositions broadcast by them (R., 115).

Quite apart from these difficulties, there is no way of placing a value for royalty purposes upon the performing right of a single number or a group of numbers or even of the numbers of an entire catalogue of a particular music publisher (R. 115).

The remarks of Mr. Justice Brandeis in *Standard Oil Company v. United States,* 283 U. S. 163, 171 are appropriate here. He said (p. 171):

"An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. *If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition.*"

The Society makes it possible to license the public performance for profit of copyrighted musical compositions in a situation where such licensing would be otherwise impossible.

It has been held by many of the lower Courts and without exception as far as we know, that the fact that the owner of a patent, trademark or copyrights is a member of a combination prohibited by the Federal Anti-Trust Acts, does not deprive such owner of the privilege of protecting the rights given to him by the patent, trademark or copyright, as the case may be, in a *court of equity* or allow another to steal or pirate his property.[18]

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[18] *Cimiotti Unhairing Co.* v. *American Fur Co.,* 120 Fed. 672 (N. J.; reversed on other grounds, 123 Fed. 869, 198 U. S. 399); *Independent Baking Powder Co.* v. *Boorman,* 130 Fed. 726 (N. J.); *Motion Picture Patents Co.* v. *Eclair Film Co.,* 208 Fed. 416 (N. J.); *Harms* v. *Cohen,* 279 Fed. 276, 280 (E. D. Penna.); *Witmark* v. *Pastime Co.,* 298 Fed. 470, 480 (S. C.,; aff'd on opinion of D. C., 2 F. (2d) 1020); *Western Electric Co.* v. *Wallerstein,* 48 F. (2d) 268 (W. D. N. Y.); *Trico Products Co.* v. *E. A. Laboratories, Inc.,* 49 F. (2d) 404 (E. D. N. Y.); *Radio Corporation* v. *Majestic Distributors,* 53 F. (2d) 641 (Conn.); *Western Electric Co.* v. *Pacent Corporation,* 53 F. (2d) 639 (S. D. N. Y.); *National Electric Co.* v. *Circle Flexible Co.,* 57 F. (2d) 219 (E. D. N. Y.); *Radio Corporation* v. *Duovac Radio Tube Corp.,* 6 Fed. Supp. 275 (E. D. N. Y.); *General Electric Co.* v. *Wise,* 119 Fed. 922; *General Electric Co.* v. *Minneapolis Electric Lamp Co.,* 10 F. (2d) 851; *Van Kannel Revolving Door Co.* v. *General Bronze Corp.,* 6 F. Supp. 518.

By a parity of reasoning, the owner of a copyright should not be denied the right to protect the copyright in a court of equity against invasion by a State Statute, especially when no other adequate remedy is available (see Finding 11, R. 281).

V.

The State Statute is not a valid exercise of the police power.

Appellants attempt to justify the State Statute as a reasonable regulation affecting commercial dealings in copyrights, citing *Allen* v. *Riley,* 203 U. S. 347; *Patterson* v. *Kentucky,* 97 U. S. 501; *John Woods & Sons* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251; *Carbice Corporation* v. *American Patents Corp.,* 283 U. S. 27, 33; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123.

We have already seen that this Statute was not enacted in the true public interest of the citizens of the State of Florida. The provisions of the Statute destroying the rights of copyright owners operating *individually* was certainly not necessary to accomplish the purpose of destroying any alleged *monopoly.* The provisions making the Society an unlawful combination in restraint of trade were not necessary if the Society really is a combination in restraint of trade, because earlier Florida Statutes which continue in effect, and the penalties of which are made cumulative, amply provide for the regulation and punishment of combinations in restraint of trade.

The regulations which were held reasonable in the cases relied on by appellants are of an entirely different scope.

In *Allen* v. *Riley, supra,* a Kansas Statute made it unlawful for any person to sell or barter any patented right

without first filing in the particular county a copy of the letters patent, stating under oath that they were genuine and that they had not been revoked or annulled, and that such person had full authority to sell or barter the same. It further required that any note taken in consideration of a patent right must recite "Given for a patent right". These statutes were passed to meet a well-known evil. The Court pointed out that small expense was involved in complying with the statute, and that the statute was a reasonable means of meeting the evil of fraudulent sales of non-existent patents. In upholding the statute, this Court warned against such statutes as the one at bar, saying at page 355:

> "To uphold this kind of a statute *is by no means to authorize any State to impose terms which, possibly*, in the language of Mr. Justice Davis, in *Ex parte Robinson*, 2 Biss. 309, *'would result in a prohibition of the sale of this species of property within its borders*, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the Constitution.' *Such a statute would not be a reasonable exercise of the powers of the State."* (Italics ours.)

Woods v. *Carl, supra*, and *Ozan Lumber* v. *Union County, supra*, followed *Allen* v. *Riley, supra*, in interpreting a similar Arkansas Statute.

Patterson v. *Kentucky, supra*, involved a Kentucky statute which required the inspection of oils and other inflammable fluids used for illuminating purposes, and prohibited the sale for such purposes of any substances which could ignite at a certain temperature. The defendant, who was convicted of selling oil in violation of the statute, defended on the ground that his process was protected by letters patent. The statute was upheld as a reasonably necessary means of protecting the lives and health of the citizens of

Kentucky. As the Court pointed out, this was a mere police regulation "strictly and legitimately for police purposes", ~~which, said~~ at page 506 that "police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health and property, which each State owes to her citizens" must be upheld.

The State Statute was not enacted in good faith and has no appropriate or direct connection with the protection of the citizens of Florida, except to the extent that it immunizes 367 citizens of that State against enforcement of the Federal Copyright Act.

Appellants complain that the purpose of the Florida legislature in passing this Statute cannot be considered, citing *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126. In that case the court refused to "speculate as to the motives of the State" where there was nothing on the face of the statute or by its necessary operation to justify an assumption that the State has not acted in good faith.

In the case at bar, evidences of bad faith on the part of the legislators appear both on the face of the Statute and in its practical operation. Under the State Statute it is impossible for any owner of a copyrighted musical composition to enforce the payment of royalties by Florida users who profit from the public performance of such copyrighted works whether the copyright owners act as individuals or whether they act collectively. If the copyright owners act as *individuals*, they are barred from collecting license fees for the public performance for profit apart from the amount charged for the sale of sheet music, and they cannot collect royalties from Florida users who import their music from other States by contract with third parties who give such performances by means of records or other articles or devices serving to reproduce the copyrighted work mechanically. If the copyright owners act *collectively* and attempt to issue blanket licenses (which is the only

method evolved in any country for the licensing for the right of public performance), they necessarily run afoul of the Statute and are subject to its drastic penalties. If the purpose of this Statute were to regulate monopolies or combinations in restraint of trade, there would be no reason for limiting the rights of copyright owners who act as individuals. Those sections which curtail the rights of individual copyright owners, and which appellants would have the court ignore upon this appeal, show clearly that the Statute was not passed in the *bona fide* public interest of the State of Florida.

Since the Statute *on its face* shows an absence of good faith it is entirely proper to examine the circumstances surrounding passage of the Statute; and since the Statute was obviously passed for the benefit of a few users of music in the State of Florida, who secured passage of such Statute, that fact is relevant in passing upon the question of whether the Statute was enacted in the public interest.

Carbice Corporation v. *American Patents Development Corp., supra,* merely cites the above cases in a footnote at page 33 for the proposition that the grant of a United States patent does not exempt the patented product from limitations imposed by said police power. This, of course, does not give the States the right to enact unconstitutional statutes by prefacing them with a statement that they are enacted in the public interest. In that footnote, Mr. Justice BRANDEIS also refers to the case of *Webber* v. *Virginia,* 103 U. S. 344, where it is said at page 347:

> "It is only the right to the invention or discovery—the incorporeal right—which the State cannot interfere with."

The statute in *Webber* v. *Virginia* was held to discriminate against non-resident owners of patents and was invalidated on that ground. Referring to those subjects which

come under the powers reserved to Congress, this Court there said at page 351:

> "Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe."

If each State were free to make its own regulations on the subject of copyrights like that of the State of Washington considered on the appeal to this Court in *Buck* v. *Gallagher* (October Term, 1938, No. 329) (some States enacting statutes like the State Statute and others conceiving some other form of regulating copyrights), the constitutional provision reserving to Congress the power to secure to authors and inventors the exclusive rights in their respective writings and discoveries for limited periods of time would be completely nullified.

Fox Film v. *Doyal, supra*, points out one feature of a copyright that the State Statute completely ignores. This Court there said (286 U. S. 123, 127):

> "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."

Under the State Statute the right to exclude others from using a copyright in public performances for profit is confiscated if the copyright owner chooses to exercise one of the rights under a copyright, namely, the right to sell copies. This Court also pointed out in the *Fox Film* case that a tax on copyright royalties must be non-discriminatory and must not hamper the execution of the policy of the copyright statute (p. 131).

The State Statute not only discriminates against copyrights, but makes the enjoyment of certain rights therein impossible, and as to those rights confiscation results.

VI.

The State Statute impairs obligations under existing contracts.

Section 3 of the State Statute provides that "All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforcible in any Court within this State." The collection or attempted collection of moneys thereunder is made illegal and subjects the combination, its agents, members or representatives seeking to enforce the same to the penalties of the Statute.

Thus the State Statute destroys all of the 367 contracts now existing between the appellee Society (representing all its composer, author and publisher members jointly) and users located in the State of Florida.

The contracts between the Society and users in Florida and between the Society and its members were valid when made and cannot now be declared illegal; nor can the obligations thereunder be altered by legislative fiat.

The Constitution of the United States provides (Art. I, §10):

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

It is obvious that the purpose of destroying existing contracts is to benefit the other parties to those contracts at appellees' expense. There is no public interest or public necessity involved.

In *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), this Court invalidated an Arkansas statute which impaired the security of bondholders under the guise of "public interest." This Court there said at p. 62:

"What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

VII.

The State Statute interferes with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.

Section 8 of the Copyright Act provides as follows as to recognition of copyrights in works of citizens and subjects of foreign States:

> "(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

> "The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

Pursuant to this provision a number of treaties have been entered into between the United States and foreign countries and there have been 62 Presidential proclamations establishing reciprocity between the United States and foreign countries. (See Copyright Office Bull. #14, pp. 39-40A).

Such reciprocity has been established on the basis of copyright laws as enacted by Congress. If each of the States may modify those laws the basis upon which these treaties have been entered into and the proclamations issued will be entirely destroyed.

The Society has reciprocal agreements with similar societies existing in practically every civilized foreign country of the world. These agreements are made pursuant to the treaties and proclamations mentioned above. Since the State Statute nullifies these contracts it interferes with rights protected by treaties which are the supreme law of the land.

The Society is entitled to assert in this action the rights of foreign societies under treaties and proclamations, since the interference with those treaties and proclamations by this Statute will injure appellees' contractual relations with the nationals of foreign countries.

In this respect the case at bar is similar to *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535-6, where this Court held that the owners of schools could protect their business enterprises by injunction against interference with the constitutional rights of parents of children who were their patrons and customers.

VIII.

The suit is not premature.

Appellants contend that as to Sections 7-A, 11-A and 11-B, this suit is premature (Applts.' br. 62-5).

These Sections subject appellees to the jurisdiction of the Florida State Courts through fictitious definitions of "doing business" and of an "agent" authorized to accept service (Sec. 7-A); enforce penalties of $100 a day for failure to furnish incriminating evidence in any suit brought against them by service of process in the manner described in Section 7-A, or otherwise (Secs. 11-A and 11-B). These sections are merely steps in the statutory scheme to impose upon appellees such onerous burdens and such drastic penalties that they will not attempt to enforce their property rights and their rights to sue in the Federal Court in the State of Florida.

Appellants apparently concede that the threat of injury under the other Sections of the Statute is pressing and immediate. The injury under the three Sections mentioned above is likewise immediate. Unless appellants are enjoined from enforcing this Statute, appellees dare not do any of the acts condemned by the Statute because the penalties to be visited upon them will be not only the fines and imprisonments provided for in the Statute but also the penalty of $100 a day for each day that they fail to furnish incriminating evidence under Sections 11-A and 11-B. Likewise, appellees will be subjected to a dissolution suit and other suits provided for in the Statute on service which may be immediately obtained in the jurisdiction in which they do not reside and are not in fact doing business. All these dangers are immediate and pressing. They dare not act presently in violation of the Statute because of these penalties, and the threat of the Statute is an injury to and an invasion of their property rights.

In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), an action was brought to enjoin enforcement of a statute two years before its effective date. In affirming a decree granting an interlocutory injunction, this Court said at p. 536:

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

This doctrine was reiterated in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287-8.

IX.

The Statute must fall as a whole, and its separate sections cannot be separated.

The scheme of the State Statute is to destroy the right of public performance for profit in the State of Florida, whether the right is licensed individually by the separate owners of the copyright or whether it is licensed collectively through the Society. Appellants seek to divorce the two groups of provisions on the theory that they will not enforce the Statute against individuals who sue in the Federal Courts for copyright infringement, but will enforce it if the Society should sue or attempt to sue in the Federal Courts or elsewhere. (See letter of Tyrus A. Norwood, Assistant Attorney General, dated March 7, 1938, Ex. "5" annexed to answer of appellees to Motion to Vacate Decree, p. 24.)

The right of public performance for profit of all members of the Society has been transferred to the Society for

a period expiring December 31, 1940. Under the circumstances, the sections barring the licensing of performing rights separate and apart from the sale of sheet music are presently applicable. Sales of sheet music are controlled by the members of the Society acting individually. The Society has nothing to do with such sales, nor has it anything to do with the manufacture or sale of records; but the Society owns the right of *public performance for profit*, and it is only that right which is affected by *all* the sections of the Statute. Consequently, the validity of every section of the Statute is before this Court.

Where it is probable that certain provisions of the Statute would not have been enacted but for other provisions which are held bad, all the provisions of the Statute must fall together. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 316; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 243.

To sustain some of these provisions while invalidating others would be to rewrite the Statute and give it an effect altogether different from that sought by the Statute when viewed as a whole. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

As this Court said in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 87: "the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

X.

The Court below properly exercised its discretion in granting the interlocutory injunction.

It is submitted that the Statute is invalid on its face as has already been shown. If this be true, the Court clearly acted within its proper discretion in granting an interlocutory injunction. Since there has been no abuse of discretion the decree below should be affirmed. *Corporation Commission* v. *Cary*, 296 U. S. 452, 458 (1935); *Alabama* v. *United States*, 279 U. S. 229 (1929); *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 50-51 (1923).

In *Oil Company* v. *Conway*, 279 U. S. 813 (at 815), this Court said:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted."

Special findings 10 and 11 of the Court below (R. 280-281), bring this case directly within the rule just stated.

The granting of interlocutory injunctions restraining the enforcement of similar statutes enacted in Nebraska and Tennessee indicates that a proper exercise of discretion required the granting of an interlocutory injunction.

XI.

The findings of fact and conclusions of law comply with Equity Rule 70½.

Appellants now criticize the sufficiency of the findings of fact. Their statement of points to be relied on criticize the findings only to the extent that they were not filed prior to or contemporaneously with the granting of the interlocutory injunction (R. 287). The sufficiency of the findings is not challenged in the statement of points relied on. Their sufficiency is challenged for the first time in Appellants' Brief on this appeal.

One of appellants' criticisms is that the findings are "merely a condensation of the bill of complaint" (Applts.' br. p. 112). It is difficult to imagine a set of findings being anything other than a condensation of a bill of complaint where no answer has been interposed and where the allegations are not denied.

The undisputed facts support the findings of the court, and those findings are amply sufficient to sustain the decree.

In *Interstate Circuit, Inc. v. United States*, 304 U. S. 55, relied on by appellants, there were no findings whatsoever.

In the case at bar the findings fully comply with the provisions of Equity Rule 70½.

CONCLUSION.

The decree appealed from should be affirmed.

Thomas G. Haight,
Frank J. Wideman,
Louis D. Frohlich,
Herman Finkelstein,
Manley P. Caldwell,
Counsel for Appellees.

December, 1938.

P. 7,

UPREME COURT OF THE UNITED STATES.

No. 276.—October Term, 1938.

eorge Cooper Gibbs, Individually and as Attorney General of the State of Florida, et al., Appellants, *vs.* ene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al.	On Appeal from the District Court of the United States for the Northern District of Florida.

[April 17, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion for failure to set out facts sufficient to show Federal or equity jurisdiction, or to constitute a cause of action, and granting an interlocutory injunction against the enforcement of a Florida statute aimed at combinations fixing the price for the privilege of rendering privately or publicly for profit copyrighted musical compositions. Sec. 266, Jud. Code.

The appellant, the state Attorney General and various State Attorneys, are officers of the State of Florida charged with the enforcement of the act. The appellees, complainants below, are the American Society of Composers, Authors and Publishers, an unincorporated association organized under the laws of the State of New York; Gene Buck as president of the Society; various corporations publishing musical compositions; a number of authors and composers of copyrighted music; and several next of kin of deceased composers and authors. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest.[1]

One of the rights given by the Copyright Act is the exclusive right to perform copyrighted musical compositions in public for

[1] Equity Rule 38.

profit.[2] The bill of complaint alleges that users of musical compositions had refused to recognize this statutory right and to pay royalties for public performances for profit, and that authors, composers and publishers were unable, individually, to enforce their exclusive right because of the expense of detecting and suing for infringement throughout the United States. The Society was founded in 1914 to license performance of copyrighted music for profit and otherwise protect the copyrights. The state statute was directed at organizations like the Society and became effective on June 9, 1937.[3] So far as is important here, the statute makes it unlawful for owners of copyrighted musical compositions to combine into any corporation, association or other entity to fix license fees "for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit," when the members of the combination constitute "a substantial number of the persons, firms or corporations within the United States" owning musical copyrights. It declares the combination an unlawful monopoly, the price-fixing in restraint of trade, and the collection of license fees and all contracts by the combination illegal.

The bill attacked the statute as contrary to the Constitution and laws of the United States and the constitution of Florida. More specifically, it urged that the law impinged upon rights given by the Copyright Act of 1909, deprived complainants of rights without due process of law and without the equal protection of the laws, impaired the obligation of contracts already executed, and operated as an ex post facto law.

There was a formal allegation that the matter in controversy exceeded $3,000, exclusive of interest and costs. In addition, the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights worth in excess of $100,000; that it would cost each individual more than $10,000 to create an agency in Florida to protect himself against infringement by unauthorized public performances for profit, to issue licenses and to check on the accuracy of uses reported; that fees collected in 1936 in Florida amounted to $59,306.81 and that similar sums were expected in the

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2 Act of March 4, 1909, Sec. 1(e), c. 320, 35 Stat. 1075, 17 U. S. C. Sec. 1(e).

3 Fla. Gen. Laws 1937, Vol. I, c. 17807.

future; and that in 1936 each of the three publishers received more than $50,000 from the Society and each individual more than $5,000.

A motion for a temporary injunction was made on February 7, 1938, the same day the bill was filed. Voluminous affidavits were presented in support of the motion. They tend to substantiate the allegations of the complaint on the value of the copyrights and the income from the Society. Each publisher deposed that it had received more than $50,000 from the Society in 1936, that its contract with the Society had a value in excess of $200,000, and that to fix prices on each composition for each use in Florida would require an expenditure of more than $25,000. The affidavits of the individuals showed annual incomes to them from the Society of from $3,000 to $9,000; contracts with the Society which the affiants valued in the thousands of dollars and an expense, in one instance, as high as $5,000 to comply with the requirements of the Florida statute.

On March 3, 1938, the appellants moved to dismiss on several grounds: (1) absence of jurisdictional amount; (2) failure to state a cause of action; (3) want of equity and other objections not strongly pressed at this time.

The district court granted an interlocutory injunction and denied the motion to dismiss the bill. It thought that great damage would result unless the injunction issued and that there was grave doubt of the constitutionality of the act. Its findings of fact and conclusions of law were filed about a month and a half after the per curiam decision. It found that "the matter in controversy exceeds $3,000 exclusive of interest and costs."

Federal Jurisdiction.—The issue was raised in the lower court by a motion to dismiss on the ground that it affirmatively appears "from the allegations of the bill . . . that the jurisdictional amount of $3,000.00 . . . is not involved . . . in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers . . . and it does not affirmatively appear that the loss of any member of said society due to the enforcement of [the challenged act] would amount to the . . . necessary jurisdictional amount." Other jurisdictional averments of the motion state that the Society cannot suffer any loss from the legislation because it affirmatively appears that the Society divides all its proceeds from licensing between its members and affiliates and "therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on

the members of the Society, and not on the Society itself." Finally the motion sets out the lack of jurisdiction because it affirmatively appears from the allegations of the bill that the jurisdictional amount is not involved "because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would make by the non-enforcement of said law." As the form of the motion on the jurisdiction admitted the bill's statements, it was submitted on the allegations without the production of any evidence.

This method of testing the jurisdiction properly raises the question. No issue is made as to the standing of the Society or its members to sue. The basis of the attack is that there is a lack of the essential allegations as to the value of the matter in controversy. As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.[4] Both complainants and defendants were content to rest upon the bill and motion.

The bill alleges that the value of the matter in dispute exceeds the jurisdictional amount. Such a general allegation when not traversed is sufficient, unless it is qualified by others which so detract from it that the court must dismiss *sua sponte* or on defendants' motion.[5] In this instance, the allegation is, in effect, traversed by the language of the motion which asserts that no plaintiff has shown loss from enforcement equal to the jurisdictional amount. No other allegations are denied. By this method of attack the facts set out in the bill are left unchallenged for the court to accept as true without further proof. The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants. If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.[6] In view of the unchallenged facts, federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jur-

[4] Wetmore v. Rymer, 169 U. S. 115, 120, 121; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184; KVOS, Inc. v. Associated Press, 299 U. S. 269, 278.

[5] KVOS, Inc. v. Associated Press, 299 U. S. 269, 277; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[6] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

additional amount,[7] or, if to the aggregate of all the members in this representative suit, the matter in controversy is of that value. This Society, an unincorporated association with a membership of more than a thousand of the leading authors, composers and publishers of music, has received by assignment and possesses, for a five-year period which covers the time here involved, the "exclusive right to publicly perform for profit" musical compositions owned by its members. Licenses are issued by the Society to users in Florida "for the public performance for profit" of these compositions. After payment of expenses and royalties for similar rights to foreign associates, and retention of certain reserves, the receipts from licenses are divided among the members in amounts and by classifications fixed by the articles of association and the Board of Directors. The Society undertakes to protect itself and its members from piracies of the rights assigned to it. The Society has, in the absence of the challenged legislation and without now giving consideration to other objections as to the legality of its organization, a right to license which may be injuriously affected by the Florida statute. Whether this right to license flows from its limited ownership of the copyrights or by authority of its members is immaterial here. We find it unnecessary to decide whether this unincorporated association has standing to sue and confine our decision to the amount in controversy between the members of the Society and the defendants. Members, both corporate copyright owners and individual composers of music and lyrics, are plaintiffs. They represent all other members. As the members own the copyrights, less the limited assignment to the Society of the right of public performance for profit, and share in the earnings through mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action.[8] These members

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[7] Grosjean v. American Press Co., 297 U. S. 233, 241-242. Clark v. Paul Gray, Inc., No. 534, this Term, decided today.

[8] Article XV, section 1, of the articles of association, reads as follows:

"Apportionment of Royalties—

"Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

"(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

"(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

"(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the 'Music Publisher' members, and one-half (½) among the 'Composer and Author' members respectively."

are real parties in interest. Because of the interposition of the statute they cannot in combination license production and collect fees in Florida. Unless the relief sought, the invalidation of the statute, is obtained, the members cannot conduct their business through the medium of the Society. They have a common and undivided interest in the matter in controversy in this class suit.[9]

The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is interdicted by the Florida statute. It is not a question of taxation or regulation but prohibition. Under such circumstances, the issue on jurisdiction is the value of this right to conduct the business free of the prohibition of the statute.[10] To determine the value of this right the District Court had the admitted facts that more than three hundred contracts expiring in 1940 were in existence between the Society and the Florida users; that in 1936 alone almost sixty thousand dollars was collected from the users, and that similar sums were expected for the remainder of the term. While the net profits of the business in Florida is not shown, the business of the Society, as a whole, is profitable. The three publisher parties receive more than $150,000 yearly and individuals more than $5,000 per year each. The cost of compliance with its requirements is evidence also of the value of the right of freedom from the act.[11] The complainants, other than the Society, allege without traverse that the cost to each one of providing individually in Florida the services now provided by the Society for each member would exceed $10,000. Whether this is annually, for the length of the agreement or for some other term is not shown. From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported.

McNutt v. *General Motors Acceptance Corporation*[12] differs. There the State of Indiana had passed an act regulating, not

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[9] Cf. Troy Bank *v.* Whitehead & Co., 222 U. S. 39; Shields *v.* Thomas, 17 How. 31.

[10] Scott *v.* Donald, 165 U. S. 107, 114; cf. Hunt *v.* N. Y. Cotton Exchange, 205 U. S. 322, 334; McNeil *v.* So. Ry. Co., 202 U. S. 543; Bitterman *v.* Louisville & N. R. R., 207 U. S. 205; Packard *v.* Banton, 264 U. S. 140.

[11] Packard *v.* Banton, 264 U. S. 140; Petroleum Exploration, Inc. *v.* Comm'n, 304 U. S. 209, 215; Healy *v.* Ratta, 292 U. S. 263; Buck *v.* Gallagher, No. 329, this Term, decided today.

[12] 298 U. S. 178.

prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press*,[13] relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was "the right to conduct those enterprises free of" interference. On the issue of the value of this right, it was deposed only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a non-profit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments.

Failure to State a Cause of Action.—The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction, is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction.[14] Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below.[15] Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise "grave doubts of the constitutionality of the Act" in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. This bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for

[13] 299 U. S. 269.

[14] Polk Company *v.* Glover, 305 U. S. 5, 9.

[15] O'Keefe *v.* New Orleans, 273 F. ~~570~~; Wright *v.* Barnard, 233 F. 329; 560
Doherty *v.* McDowell, 276 F. 728; Ralston Steel Car Co. *v.* National Dump Car Co., 222 F. 590, 592. Compare Kansas *v.* Colorado, 185 U. S. 125, 144-145; Wisconsin *v.* Illinois, 270 U. S. 634. Wilshire Oil Co. *v.* United States, 295 U. S. 100, 102-103.

profit is prohibited by the statute; that existing contracts are impaired; property taken without compensation; recovery on extra state contracts denied and the equal protection and due process clauses of the 14th Amendment violated in manners specifically pleaded. Drastic penalties for violation of the act are provided.[16] The manner in and extent to which the challenged statute offends or complies with the applicable provisions of the Constitution will be clearer after final hearing and findings.[17] The findings here were on the motion for interlocutory injunction and on the issue of jurisdiction.

Other Assignments.—The other material assignments of error to the interlocutory order specified on the appeal are addressed (1) to the lack of equity in the bill, (2) to the exercise of discretion in ordering a temporary injunction, (3) to the lack of findings before the order of temporary injunction and (4) to the failure to strike from the bill allegations as to certain sections which deal with contract relations between the Society and users of the musical compositions because these sections are not enforced by the state officers. We treat of them briefly: (1) It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violation and the prohibition of the issue of licenses or collection of fees show the need to protect complainants.[18] (2) Upon the conclusion that the motion to dismiss should be overruled, there was no abuse of discretion in granting an interlocutory injunction.[19] The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer charged with supervision of enforcement,[20] of readiness and willingness "to prosecute any violations of said act," sufficiently establish the immediate danger

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[16] Fine $50 to $5,000 and imprisonment one to ten years or either. Section 8, Fla. Gen. Laws, 1937, c. 17807.

[17] Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194, 211-213. Polk Co. *v.* Glover, 305 U. S. 5.

[18] Ex parte Young, 209 U. S. 123, 165; Terrace *v.* Thompson, 263 U. S. 197, 216.

[19] Alabama *v.* United States, 279 U. S. 229, 231; Ohio Oil Co. *v.* Conway, 279 U. S. 813.

[20] Sec. 10, Fla. Gen. Laws, 1937, c. 17807.

from enforcement.[21] No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court. Ordinarily it would be expected that where a temporary injunction is considered necessary to protect the rights of complainants against the allegedly unconstitutional action of state officers, under a statute, a final order would follow with all convenient speed. (3) The order of the trial court was entered April 5, 1938. The findings of fact and conclusions of law were not filed until May 17, 1938, after the first assignment of errors had pointed out the omission and after the appeal was allowed. The original assignment of error, which had relied upon the failure to comply with Equity Rule 70½ was amended to show subsequent compliance but no assignment of error was made on account of the fact that the findings were out of time. The objection was taken in the statement of points to be relied upon on the appeal and in appellants' brief in the specification of errors to be urged. Better practice dictates the filing of the finding of facts and conclusions of law before or contemporaneously with the order or decree. It would be useless, however, to reverse the order granting the temporary injunction and remand the cause. The temporary injunction would now be in order. (4) In answer to the fourth objection it may be said that the issue like that of constitutionality can be more satisfactorily disposed of upon final hearing.

Affirmed.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[21] Terrace *v.* Thompson, 263 U. S. 197, 214-16; Cline *v.* Frink Dairy Co., 274 U. S. 445, 451-52.

SUPREME COURT OF THE UNITED STATES.

No. 276.—OCTOBER TERM, 1938.

George Cooper Gibbs, Individually and as Attorney General of the State of Florida, et al., Appellants, *vs.* Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al.	On Appeal from the District Court of the United States for the Northern District of Florida.

[April 17, 1939.]

Mr. Justice BLACK, dissenting.

I believe the decree enjoining and suspending Florida's law prohibiting monopolistic price fixing should be reversed because

(1) No showing has been made that casts any doubt upon a State's power to prohibit monopolistic price fixing,

(2) Complainants (appellees here) failed to sustain their burden of showing $3,000.00 in controversy, as required by statute.

(3) The court below failed to require a bond or other conditions adequate to protect the people in Florida who might be injured by the injunction.

First. Do general allegations of unconstitutionality,[1] similarly general affidavits and general findings by the trial court show that the Florida statute against monopolistic price fixing is "novel, if not unique"[2] State legislation, and raise such "grave constitutional questions" that a Federal court should suspend the statute to permit complainants to continue exacting monopoly tribute from the public until the court hears evidence?

The enjoined Attorney General and prosecuting attorneys of Florida do not have, and expressly disclaim any duty to enforce the statute against appellees unless they combine to fix monopolistic

[1] Cf. Borden's Co. *v.* Baldwin, 293 U. S. 194, 203; Aetna Ins. Co. *v.* Hyde, 275 U. S. 440, 447; Public Service Commission *v.* Utilities Co., 289 U. S. 130, 136, 137.

[2] Borden's Co. *v.* Baldwin, *supra*, 203.

prices. Therefore, this injunction cannot rest upon the alleged unconstitutionality of any provisions of the statute other than those prohibiting monopolistic price fixing. And allegations of the bill attacking other provisions of the statute raise only moot questions. If this record can be said to raise any "grave", "novel", or "unique" question at all, that question is whether a State has power to prohibit price fixing by monopolies in restraint of trade.

If the issue is not narrowed to this single point, approval is given to the enjoining of State officials from action which they have no duty to perform and have solemnly disclaimed both here and in the District Court.[3] In the absence of an interpretation by the Florida Supreme Court, to what more authoritative source or evidence may a Federal court turn for the meaning of the statute, than to the decision of the highest State official charged with its enforcement? He has determined that, so far as he and the prosecuting attorneys under him are concerned, appellees may license their compositions as they please, may combine to detect and punish infringers and may operate in Florida at will, provided only that they abandon monopolistic price fixing. Even as to the statutory prohibition against price fixing, all that is before us, a practice more desirable and more in keeping with our dual form of government, previous decisions,[4] and the trend of Congressional legislation,[5] would be to refrain from Federal judicial interference until the State courts are presented with an opportunity to define the statutory duties of appellants. "And . . . the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."[6] Judicially restraining these Florida officials from action which they declare they cannot and will not take, denies to Florida the traditional respect that has been accorded State officials by this Court.[7]

Even according to the comparatively new judicial formula here applied, the only issue is whether "novel . . . unique" or

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[3] Cf., Carroll *v.* Greenwich Insurance Co., 199 U. S. 401, 412.

[4] Gilcrist *v.* Interborough Co., 279 U. S. 159, 207; Fenner *v.* Boykin, 271 U. S. 240, 243-4; cf., Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 43; and see Clark, Brandeis, JJ, dissenting, Cincinnati *v.* Cincinnati and H. Traction Co., 245 U. S. 446, 461.

[5] 28 U. S. C. 41; c. 726, 50 Stat. 738, 48 Stat. 775, 47 Stat. 70, 43 Stat. 938, 36 Stat. 1162, amended 37 Stat. 1013.

[6] Defiance Water Co. *v.* Defiance, 191 U. S. 184, 194.

[7] See Spielman Motor Co. *v.* Dodge, 295 U. S. 89, 96; Cincinnati *v.* Cincinnati and H. Traction Co., *supra*, 454, 455; Virginia *v.* West Virginia, 231 U. S. 89, 91; cf. Des Moines *v.* City Ry. Co., 214 U. S. 179, 184. This injunction makes

"grave constitutional questions" are raised by the charge that these state officials will perform their sole duty under the Florida statute of prosecuting appellees for violations of the prohibitions against monopolistic price fixing. Paraphrasing this formula, the question here actually becomes: When complainants charge in a Federal Court of Equity that a State has passed, and its officers are about to enforce, a law against monopolistic price fixing, is there so much doubt about the power of the State to prohibit monopolistic price fixing that operation of the law must be enjoined and effect denied to it until evidence is heard by the Court?

Here, both the very bill upon which the injunction now approved was granted and affidavits of record establish beyond dispute appellees' flagrant violation of the Florida law by combining to fix prices. This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination. And these fees are not the same for like purchasers even in the same locality. Evidence shows that competing radio stations in the same city, operating on the same power and serving the same audience, are charged widely variant fees for identical performance rights, not because of competition, but by the exercise of monopoly power. Since it appears that music is an essential part of public entertainment for profit, radio stations or other businesses arbitrarily compelled to pay discriminatory fees are faced with price fixing practices that could destroy them, because the Society has a monopoly of practically all—if not completely all—available music. When consideration is also given to the fact that an arbitrarily fixed lower rate is granted to a favored station itself controlled by another instrument of pub-

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strikingly pertinent the question of Justice Harlan, dissenting, in Ex parte Young, 209 U. S. 123, 179 (1908): "If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be as amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act . . . ?" His apprehensive prophecy has more than come true in the present case.

lic communication—a newspaper—the ultimate possibilities for control of the channels of public communication and information are apparent.

We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy. Should a Court of Equity grant this combination the privilege of violating a State anti-monopoly law?[8] Does a State law prohibiting such a combination present "grave constitutional questions"?

It is my position that a State law prohibiting monopolistic price fixing in restraint of trade is not "novel" and "unique" and raises no "grave constitutional questions." The constitutional right of the States to pass laws against monopolies should now be beyond possibility of controversy. "That state legislatures have the right . . . . to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question",[9] and few have challenged the power of State legislatures to ordain that "competition not combination, should be the law of trade."[10] Surely, there is presently no basis to doubt this power and to assert that its exercise raises "grave constitutional questions." As recently as 1937, this Court held that Porto Rico, with legislative powers not equal to, but "nearly as extensive as those exercised by any State legislature," could prohibit monopolistic price fixing as one of the "rightful subjects of legistion" upon which legislatures act.[11]

If the States have somehow lost their historic power to prohibit monopolistic price fixing combinations before presentation of evi-

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8 Cf., Cont'l Wall Paper Co. *v.* Voight & Sons Co., 212 U. S. 227, 262, affirming 148 Fed. 939; Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 412. M'Connell *v.* Camors-M'Connell Co., 152 Fed. 321; Pacific Postal Telegraph Cable Co. *v.* Western Union Tel. Co., 50 Fed. 493; American Biscuit & Manuf'g Co. *v.* Klotz, 44 Fed. 721; 1 Pom. Equity Juris. (3rd Ed.) § 402.

9 Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 107. "There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing [statutes which secure competition and preclude combinations which tend to defeat it] . . . To so decide would be stepping backwards." International Harvester Co. *v.* Missouri, 234 U. S. 199, 209. See, Atl. & Pac. Tea Co. *v.* Grosjean, 301 U. S. 412, 425-6; Nebbia *v.* New York, 291 U. S. 502, 529; Rast *v.* Van Deman & Lewis, 240 U. S. 342, 366-7.

10 National Cotton Oil Co. *v.* Texas, 197 U. S. 115, 129; Carroll *v.* Greenwich Ins. Co., *supra*, 411.

11 Puerto Rico *v.* Shell Co., 302 U. S. 253, 260, 261.

dence to a Federal court, at what point in our history and in what manner did they lose it? The people have not exercised their exclusive authority, by Constitutional amendment, to strip the States of their power over price fixing combinations and thus raise monopoly above the traditional power of legislative bodies.

It was expressly conceded at the bar that Florida had the Constitutional power to prohibit price fixing combinations unless the copyright laws limited this power. And, since argument of the present case, a decision rendered by us February 13, this year, made clear the principle that the copyright laws grant no immunity to copyright owners from statutes prohibiting monopolistic practices and agreements. We there declared that "An agreement illegal [by statute] because it suppresses competition is not any less so because the competitive article is copyrighted."[12]

"Due process" has been judicially endowed with great elasticity in relation to property rights, but it is inconceivable that it would afford refuge for monopolies deemed undesirable by the people's representatives. When a legislature as a matter of public policy determines to prohibit monopolistic combinations, we cannot, under any doctrine of "due process", rightfully "review their economics or their facts."[13] And, although "due process" is invoked, can evidence either add to or take from the legislative power to permit, regulate or prohibit monopolies in the public interest?

Several of the general allegations in the bill are relied upon to justify suspension of the Florida statute until evidence is heard by a court. It is said the court should hear evidence because the "bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute . . ." But what evidence can the court hear that will assist it in comparing the statute with the copyright laws? The Florida statute does not even purport to prohibit the "performance of compositions for profit," and the enjoined officials have neither threatened, nor do they intend, to prohibit such performance. It is said the bill alleges "that existing contracts are impaired" by the statute. But no contracts can be affected unless involving prohibited monopolistic price fixing. That the Florida law prohibits the continuation and execution of monopoly

[12] Interstate Circuit, Inc., *v.* United States, — U. S. —, p. —.

[13] Central Lumber Co. *v.* So. Dak., 226 U. S. 157, 161.

practices in pursuance of price fixing agreements made before the law was passed, can be no basis for constitutional objection.[14]

It is said the bill alleges "property taken without compensation." If the statute, of itself, takes property, (and no charge of unconstitutional application of the statute is made) is evidence required to show the manner of the taking? It is said the bill alleges that the statute violates "equal protection." But the sole thing threatened is prosecution of an admitted price fixing combination—comprised of practically all the musical copyright owners and publishers in the nation. ". . . . if an evil [of monopoly] is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."[15] It is said a drastic penalty is provided for practicing price fixing. What evidence will serve to enlighten the Court on the statutory penalty? That penalty is set out clearly in the statute. If it invalidates the statute, that determination should be made now.

The present case illustrates how the recently fashioned judicial formula under which State laws must be enjoined if "grave constitutional questions" are presented in a complaint, actually results in an automatic judicial suspension of State statutes upon any general complaint to a Federal court. The apparently inevitable operation of this formula runs counter to the Tenth Amendment intended to preserve the control of the States over their own local legislation, and opens the door to further evasions of the Eleventh Amendment protecting the States from suits in Federal courts.[16] A lower Federal court's refusal in its "discretion" to suspend a State statute was recently reversed because "grave constitutional questions"—requiring evidence—were deemed raised by charges that the statute by requiring citrus fruit cans to be truthfully labeled

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14 Waters-Pierce Oil Co. *v.* Texas (No. 1), *supra*, 108.

15 Carroll *v.* Greenwich Ins. Co., *supra*, 411; Central Lumber Co. *v.* So. Dak., *supra*, 160. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." United States *v.* Carolene Products Co., 304 U. S. 144, 151.

16 Cf. Ex parte Young, 209 U. S. 123, Harlan, J, dissenting, 168-204; and see Fitts *v.* McGhee, 172, U. S. 516, 528, 530; In re Ayers, 123 U. S. 443, 496, 497, 505.

violated the Constitution.[17] And here, where the District Court enjoined a State law in its "discretion", the injunction is sustained by a holding that evidence should be heard because "grave constitutional questions" are involved. However the lower court's "discretion" may be exercised, the formula apparently achieves but one result—State statutes are suspended.

Careful scrutiny of appellees' bill for injunction reveals no allegations indicating that Florida's power to prohibit monopolistic price fixing would, even under the formula applied, be altered by proof of any "particular economic facts . . . which are . . . properly the subject of evidence and of findings."[18] True, the bill alleges that the statute of Florida and similar legislation enacted by other States were "sponsored by an organized group . . . for their own selfish aggrandizement . . . without an adequate hearing being afforded to complaints and others similarly situated," and that "in truth and in fact, [the statute] was enacted not in the public interest . . . ." Appellees also allege that "unless the enforcement of this State statute is restrained . . . other States, in addition to Florida, Montana, Washington, Nebraska and Tennessee, may enact similar statutes . . . all of which would work undue hardship on complainants and would violate the spirit of the Constitution . . . ." These are some of the strongest—if not the strongest—of the bill's allegations deemed to raise "grave constitutional questions." Is the temporary injunction approved so that the Federal court in Florida may hear evidence on what constitutes the public interest of Florida? Shall the court hear evidence to determine whether or not "unless the enforcement of this statute is restrained" other States, "in addition to Florida", may similarly prohibit appellees' monopoly?

It is difficult to perceive how in the future—under this formula—any State law, directly or indirectly affecting property, can become effective until injunction proceedings have dragged their weary way through Federal courts. All State statutes might hereafter well substitute for the expression "to take effect within" a certain period of time, the words "to take effect after the Federal courts have heard evidence to determine" their reasonableness (wisdom). And the formula likewise fits Congressional enact-

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[17] The Pacific Co. v. Glover, — U. S. —.

[18] Borden's Co. v. Baldwin, *supra*, at 210.

ments. Had the pronouncement of this formula not been the culmination of gradual judicial advances, it would have been everywhere recognized as a revolutionary departure from our constitutional form of government, under which the wisdom of legislation, within the field of legislative action, was left to the judgment of elected representatives of the people.

Florida can find little comfort in the admonition that "Ordinarily it would be expected that where a temporary injunction is considered necessary . . . a final order would follow with all convenient speed." This law has now already been suspended for a year, and experience demonstrates that injunctive suspension of State laws and State action can hang in the courts for many years before receiving final disposition.[19]

Second. Jurisdictional Amount.

These eleven appellees alleged in their bill for injunction that they sued on behalf of themselves and the more than 1,000 other (American) members of the Society. No determination is made here "that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount"—$3,000. However, while appellees are not aided in establishing the jurisdictional amount by the "allegation that [they] . . . sued on behalf of others similarly situated,"[20] the Court nevertheless holds that the jurisdictional amount is in controversy in "the value of the aggregate rights of all members" (including the more than 1,000 who have not appeared in person) to combine and fix prices in Florida.

"Assuming that such a case as this will be called a class action, and . . . could be maintained as such . . . yet that it may be properly a class action does not affect the rule against aggregation [of claims for making up the jurisdictional amount], because [such aggregation] . . . is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein."[21] Appellees assert no common and undivided rights in any fund[22] or property;[23] "the amount payable to each by the

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19 See dissent, McCart *v.* Indianapolis Water Co., 302 U. S. 419, 435, and note.

20 Lion Bonding Co. *v.* Karatz, 262 U. S. 77, 86.

21 Eberhard *v.* North Western Mut. Life Ins. Co., 241 Fed. 353, 356, referred to with apparent approval in Lion Bonding Co. *v.* Karatz, *supra.*

22 Smith *v.* Swormstedt, 16 How. 288.

23 Beatty and Ritchie *v.* Kurtz, 2 Pet. 566.

Society]—depends upon his contract alone."[24] Neither does appellees' bill seek, as would the traditional class or representative bill in equity, to protect group rights all claimed under and traceable to a single decree,[25] or rights "which . . . . [no one plaintiff] can enforce in the absence of the" others because derived from a single security instrument.[26] In this proceeding, all that members of the Society have in common is their alleged right to violate with impunity the Florida statute against price fixing. Unless opposition to and violation of the statute can be their bond of unity, appellees have "separate and distinct demands . . . [united] for convenience and economy in a single suit, [and] it is essential that the demand of each be of the requisite jurisdictional amount."[27]

Permissible joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court. Rule 38, under which this class or representative suit was brought, did not, in fact could not, extend that jurisdiction which depends solely upon Acts of Congress.[28]

A common desire to disregard a State law cannot serve as a common and undivided interest for purposes of Federal jurisdiction;[29] otherwise, all who oppose such a law can aggregate the values of their alleged individual rights so to disregard the law, in order that they may escape the courts of a State and bring its law before a Federal court. And the fact that a State law inflicts pecuniary loss upon members of a non-profit association because of their membership does not permit aggregation of the members' pecuniary interests as a basis for attack upon the law in a Federal court by some members "on behalf and with the authority of all."[30] Here, the individual members have made no showing of what they as in-

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24 Eberhard case, *supra*, 356.

25 Shield *v.* Thomas, 17 How. 3, but see Chapman *v.* Handley, 151 U. S. 443.

26 Troy Bank *v.* Whitehead & Co., 222 U. S. 39, 41.

27 *Id.* 40.

28 Alaska Packers *v.* Pillsbury, 301 U. S. 174, 177; Christopher et al. *v.* Brusselback, 302 U. S. 500, 505; see, KVOS, Inc. *v.* Ass. Press, 299 U. S. 269, 279.

29 Pope *v.* Blanton, 10 F. Supp. 15, 18, dismissed per curiam for lack of requisite jurisdictional amount in controversy, 299 U. S. 521; Gavica *v.* Donaugh, 93 Fed, (2d) 173.

30 Rogers *v.* Hennepin County, 239 U. S. 621. The complaint appears in the original records of this Court, No. 411, Oct. Term 1915. Cf., Robbins *v.* Western Auto Ins. Co., 4 Fed. (2d) 249, cert, den., 268 U. S. 698; Woods *v.* Thompson, 14 Fed. (2d) 951, and Illinois Bankers' Life Ass'n *v.* Farris, 21 Fed. (2d) 1014, cert. den., 276 U. S. 621.

dividuals have at stake—or of what all the members as a class stand to lose by virtue of the Florida law.

The enjoined State officials have only the duty to prosecute appellees if they continue to fix prices (i. e., to issue licenses) through monopolistic combinations, and these officials have expressly disavowed any intention to do more.[31] Appellees are left free to form such combinations as they please in Florida for the purpose of protecting against copyright infringements. They are here deprived by the Florida statute only of the right to combine to fix prices, and the value of that right must determine the amount in controversy.[32] That right was the object which appellees' bill for injunction sought to protect from allegedly unconstitutional interference.[33] Yet, there is no evidence at all in the record from which even an inference can be drawn as to the amount, if any, individual appellees or other members might lose in Florida by selling or licensing their copyrighted articles individually (which the law permits) instead of fixing prices by monopolistic combination (which the law prohibits). No showing was made that appellees ever have made or ever will make any profit from the operations of the Society in Florida. As stated by the majority opinion, the record discloses that the business of the Society in the entire United States and sixteen foreign countries is a profitable one. But we cannot assume from this that its Florida operations are as a unit profitable. In fact, the record shows only that the entire Society had sixty thousand dollars worth of contracts in Florida in 1936. We are not told what ratable share of this sixty thousand dollars would come to any individual in the division of the entire amount among the forty-five thousand odd members affiliated with the Society (in America and abroad). Each individual member's gross income from Florida might be less than $1.50 per year.

The loss of a right to an annual gross income of $1.50 cannot amount to the loss of a right valued at ten thousand dollars—as appellees allege—on the theory that it would cost ten thousand dollars to collect the $1.50 income individually. And it is, of course, possible that if the Society in fact has no net income from Florida but operates there at a loss, each member's ratable share of income from the Society will actually be increased when the unprofitable Florida

31 Cf., Carroll v. Greenwich Ins. Co., *supra*, 412.

32 Scott v. Donald, 165 U. S. 107, 114, 115.

33 Cf., Glenwood Lt. Co. v. Mutual Lt. Co.; 239 U. S. 121, 125, 126; WOS, Inc. v. Ass. Press, 299 U. S 269, 277.

operations cease because of the statute. Measuring the amount in controversy on the above theory, jurisdiction might be obtained by a Federal court to enforce rights of a value far less than the jurisdictional $3,000 required by Congress. For illustration, a statute might prohibit parking of automobiles on certain city streets; an automobile owner assailing the law might be admitted to the jurisdiction of the Federal court by alleging that it would cost him more than three thousand dollars to purchase a parking lot in which to park off the streets of the prohibited area. He would thus "comply" with the statute and abandon the streets in obedience to it.[34] I do not believe that jurisdiction of a Federal court can be rested on measurements of the imagined cost of what a complainant conceivably could, but certainly would never do as an alternative to action forbidden by statute.

The statutory monetary standard is precise and the amount in controversy therefore cannot be conjectural. "It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

"Accordingly this Court has uniformly been strict to adhere to and enforce it."[35]

Without proof of the amount each appellee or member has in issue, how can the "aggregate amount" be fixed at any figure?

Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.[36] "The policy of the statute calls for its strict construction."[37] Since no individual complainant has established that he has the statutory jurisdictional amount in controversy, to rest jurisdiction of a Federal court on no more than the unified desire of

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[34] "Cost of compliance" with an assailed legislative act may be considered the measure of the amount in controversy when a right of complainant is regulated, or where he is required to take affirmative action. Cf., Kroger Gro. Co. v. Lutz, 299 U. S. 300, 301; McNutt v. Gen. Motors Etc. Corp., 298 U. S. 178, 181. But appellees have not been required to take any affirmative steps, nor are they permitted to fix prices on condition that they "comply" with regulations. The fixing of prices through combinations has been prohibited. Obviously, appellees cannot be prohibited from doing that which they may also do by "complying" with the statute.

[35] Elgin v. Marshall, 106 U. S. 578, 581.

[36] See Healy v. Batta, 292 U. S. 263, 270.

[37] *Id.*

many complainants to violate a State statute prohibiting monopolistic price fixing, does constitute a "novel, if not unique," and "grave" judicial departure from the jurisdictional requirement fixed by Congress.

Third. The otherwise complete suspension of Florida's law was limited only by the condition that appellees make bond of five thousand dollars payable to the Attorney General of Florida and the District Attorneys of the State. Manifestly, these officials have no individual interest in the monopoly prohibited by the Florida law. The major injuries accruing from the suspension of the law will not be inflicted upon them, but upon the people of Florida who are required to pay monopoly prices while the law remains enjoined. Thus, while the law is suspended, these non-resident appellees can carry on a monopolistic business in Florida contrary to its prohibitions, and the people of Florida who must pay monopoly prices are granted no protection. We have recently declared the governing principal that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interest the injunction may affect."[38] The injunction here was not granted upon conditions that would protect the interests of all who might be affected by it. It neither ordered the monopoly tribute exacted by appellees to be paid into court during suspension of the Florida statute, nor required a bond for the benefit of, and adequate to indemnify those who must pay this tribute until the court permits the statute to go into effect.

Nevertheless, this Court now refuses to correct the grossly unjust failure to protect those who may suffer irreparable injury from the suspension of the Florida law on the ground that "No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court." However, the lower court has already exercised its control resulting in manifestly injurious error apparent on the record.[39] And as "upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper."[40]

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38 Inland Steel Co. *v.* United States, decided January 30, 1939, — U. S. —, p. —.

39 See, Lamb *v.* Cramer, 285 U. S. 217, 222; United States *v.* Tennessee & Coosa R'd, 176 U. S. 242, 256; Revised Rules of the Supreme Court of the United States, 27, paragraph 6; cf., Mahler *v.* Eby, 264 U. S. 32, 45.

40 United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 423; Cincinnati *v.* Cincinnati & H. Trac. Co., *supra*, 454; Ridings *v.* Johnson, 128 U. S. 212, 218; cf., Patterson *v.* Alabama, 294 U. S. 600, 607.

Litigation is not a game in which justice can be awarded only to the alert and fastidious objector, particularly when—as here—a court suspends statutory rights of members of the public who, not being in court, have no opportunity to object. The injustice to the public apparent on this record violates the rudimentary principles of equity and fair play. We should neither condone nor permit it.

They who attack the constitutionally of a law, obtain its judicial suspension, and then continue to violate its terms, should not benefit by the suspension, in the event the law is later held constitutional. Otherwise, a judicially granted period of immunity will reward litigants who unsuccessfully assail the constitutionality of legislation. Seemingly, the time has arrived when despite our constitutional system of government no State law can become effective until a Federal court hears evidence on its constitutionality. The courts—responsible for this fundamental change—should at least protect citizens of an enacting State from disobedience to a State law permitted by an erroneous or improvident interlocutory injunction.

The interlocutory injunction should be vacated.